88-1610

No.

Supreme Court, U.S.
FILED
APR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF
EDUCATION,
Petitioners,

vs.

DOUG JAGER and WILLIAM JAGER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Do ceremonial invocations traditionally given at public community events such as high school football games violate the Establishment Clause?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Douglas County School District and Douglas County Board of Education ("the School District") respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 862 F.2d 824 and is reprinted as Appendix I to this Petition. The Orders of the District Court are reprinted as Appendices II through V. The Order of the Court of Appeals denying the Suggestion of Rehearing In Banc is reprinted as Appendix VI.

JURISDICTION

The opinion of the Court of Appeals was entered on January 3, 1989. 862 F.2d 824 (App. A1). A timely Suggestion of Rehearing In Banc was denied on March 3, 1989. App. A75. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion."

STATEMENT OF THE CASE

1. Statement of the Facts

High school football games in Douglas County, Georgia have traditionally been opened with a brief ceremonial invocation. Invocations have been an integral part of the pre-game ceremonies at Douglas County High School football games since the school acquired a public announcement system in 1947. The same long-standing tradition exists in many public high schools in Georgia and other states. Invocations have become as much a part of the tradition of high school football as the national anthem, marching bands, cheerleaders and baton twirlers.

There are five home football games at Douglas County High School each year. They are played at night in a stadium. Attendance is entirely voluntary. A substantial part of the crowd is composed of adults; the students who choose to attend are primarily ages 16 to 18, with

younger students generally being accompanied by their parents.

Invocations last 60 to 90 seconds and follow traditional themes. A typical invocation emphasizes the values of sportsmanship and fair play, both for spectators and participants, and focuses on the need for safety.

Plaintiffs admitted at trial that the content of the invocations given in the past was "essentially neutral" and unobjectionable. Trial transcript at 315. They acknowledged that reminding people about fair play and sportsmanship is important, and that invocations are valuable as a custom and tradition. *Id.* at 185. They agreed that no invocation speaker has ever attempted to proselytize or convert any part of the audience. *Id.* at 57 and 176. They knew of no instance in which an invocation had inhibited a person's religious views. *Id.* at 186-187.

In late 1985, plaintiff Doug Jager, a student at Douglas County High School, objected to the invocations. In an effort to compromise and work out their differences, he and his father, William Jager, and their attorneys met with the school superintendent and the school board's attorney. Three local ministers, one of whom had been initially contacted by Doug Jager, also attended the meeting.

The Jagers' attorney suggested that ministers should no longer participate in the giving of invocations and instead that invocation speakers should be selected from students, faculty and parents without regard to the religious or lack of religious beliefs of the speakers so as "to avoid the appearance of religious purpose and entanglement." Plaintiffs' Trial Exhibit 6. This concept

became known as the "equal access plan." The district court described the equal access plan as follows:

> Under the terms of the proposed "equal access" plan, all clubs and organizations at the school can designate members of their clubs to give invocations. Also, any student, parent or school staff member can submit his or her name. The student government will then select the invocation speaker at random. No ministers will be involved as invocation speakers nor will they be involved in selecting such speakers. The school will not attempt to control or otherwise monitor the content of the invocations. The invocation speakers will be selected without regard to their religion or lack of religious beliefs.

App. A56.

Before this lawsuit began, the school superintendent met with the principals of the high schools in Douglas County and instructed them to follow the equal access plan for selecting invocation speakers. The school superintendent testified at trial that if permitted to continue having invocations, the School District would continue to implement the equal access plan.

2. The Decision of the District Court

The Jagers filed this action on September 19, 1986, to enjoin the School District from continuing the tradition of having pre-game invocations. They also sought a declaration that the invocations violate the First Amendment and the Georgia Constitution.[1]

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1. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1334 and the pendant jurisdiction doctrine.

The case was tried to the court on November 14 and 15, 1986. The court found that ceremonial invocations under the equal access plan that had been put into effect before the suit was filed serve a number of secular purposes, these being "to continue a custom and tradition of long-standing, to add a tone of solemnity and dignity to the proceedings and to remind the spectators and players of the importance of sportsmanship and fair play." App. A57.[2] The court entered a subsequent order explicitly holding that invocations under the equal access plan are facially constitutional.[3]

3. The Decision of the Court of Appeals

On January 3, 1989, the Eleventh Circuit issued a 2-1 decision holding that invocations under both the prior practice and the equal access plan violate the Establishment Clause. *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) (App. A1). Judge Peck concurred in the result, and Chief Judge Roney

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2. The district court also found that a purpose of the pregame invocations was "to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity," and held that this purpose violated the Establishment Clause. App. A57. However, the district court made it clear that this finding had reference only to the abandoned past practice in which mostly Protestant ministers gave the invocations. App. A57. The district court expressly held that the equal access plan, which excludes participation by ministers, is constitutional on its face. App. A60.

3. Only the facial constitutionality of the "equal access" plan is at issue. The Jagers filed their complaint before any invocation was given during the 1986 football season. The district court heard no evidence, and made no findings or conclusions, with respect to the constitutionality of the plan as applied.

The district court further held that the prior practice of having ministers as invocation speakers was not moot and violated the Establishment Clause. If this Petition for a Writ of Certiorari is granted, the School District will contend that the prior practice was moot because it was abandoned and replaced by the equal access plan before the complaint was filed.

filed a lengthy dissenting opinion. Although the Eleventh Circuit opinion reversing the district court apparently represented the reasoning of only a single judge, it is referred to herein as "the Court of Appeals' opinion."

Directly contrary to the Sixth Circuit, the Court of Appeals here refused to analyze the equal access plan under *Marsh v. Chambers,* 463 U.S. 783 (1983), in which this Court upheld a state's practice of having invocations at its legislative sessions. *Cf. Stein v. Plainwell Community Schools,* 822 F.2d 1406 (6th Cir. 1987) (holding that invocations at high school graduation ceremonies are permissible under *Marsh*). The Court of Appeals concluded that *Stein* was wrongly decided. 862 F.2d at 829 n.9 (App. A12).

Purportedly applying the three-part test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court of Appeals held that the equal access plan violates the Establishment Clause because the school district could have served the secular purposes by requiring secular inspirational speeches instead of invocations and because the invocations have the effect of endorsing religion. 862 F.2d at 830 (App. A13-A14).

Chief Judge Roney dissented. He agreed with the Sixth Circuit that the validity of the invocations permitted by the equal access plan should be analyzed and upheld under *Marsh v. Chambers,* and further found that the invocations are also constitutional under the *Lemon v. Kurtzman* test.

Chief Judge Roney wrote that the Court of Appeals' opinion "has pushed the Establishment Clause further than it needs to be pushed to preserve the rights there sought to be protected." 862 F.2d at 835 (App. A26).

After carefully analyzing the case law developed under the Establishment Clause, he stated in conclusion:

> There is a common thread . . . running through the majority of cases decided under both *Marsh* and *Lemon*: a common-sense balancing of the danger of Government establishment of religion with the recognition that religious traditions are a part of our nation's fabric. While I have applied tests and analyzed cases to reach what I believe to be a principled result in this case, I have also attempted to approach the issues in this common-sense fashion. Both paths lead to the same conclusion: the opening of public high school football games with an invocation does not constitute Government establishment of religion.

862 F.2d at 841 (App. A40-A41).

REASONS FOR GRANTING THE WRIT

I. The Constitutional Issue Is Important to the Public and Affects Many Institutions.

Our nation has a long-standing tradition of opening public events with ceremonial invocations. The recent inauguration of the President of the United States began with an invocation given by the Rev. Billy Graham (and also included a prayer by President Bush and a benediction by Rev. Graham). 135 Cong. Rec. S67 (daily ed. Jan. 20, 1989). Sessions of this Court and of lower federal courts invoke divine assistance with the language "God save the United States and this Honorable Court." Each house of Congress is opened daily with a prayer

offered by a chaplain paid by the United States.[4] Extracurricular community events at our public high schools are also begun with ceremonial invocations.

These invocations are simply "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Under the Court of Appeals' reasoning, however, many of these ceremonial invocations would be unconstitutional.

The constitutional issue raised by this case affects public institutions and officials throughout the United States. The opinion of the Court of Appeals would, if allowed to stand, invalidate years of tradition of opening public events with ceremonial invocations. This case thus presents an important constitutional issue that is worthy of resolution by this Court.

II. The Court of Appeals' Decision Conflicts With Decisions of Other Circuits and Is Wrong Under Established Precedent of This Court.

A. As Other Circuits Have Held, Ceremonial Invocations Are Constitutional Under This Court's Decision in Marsh v. Chambers.

Ceremonial invocations virtually identical to the invocations here were upheld by this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court held that the practice in Nebraska of having a state-paid chaplain open each day's legislative session with a prayer is constitutional under the Establishment Clause. The Court of Appeals attempted to distinguish *Marsh* on the ground that "invocations at school-sponsored football

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4. Furthermore, President Bush recently proclaimed May 4, 1989 as a National Day of Prayer. Proclamation No. 5942, 54 Fed. Reg. 11,483 (1989).

games were nonexistent when the Constitution was adopted."[5] 862 F.2d at 829 (App. A11-A12). This narrow reading of *Marsh* is unwarranted and inconsistent with the interpretation of *Marsh* adopted by other circuits.

As Chief Judge Roney noted in his dissenting opinion, and as both the Sixth and Seventh Circuits have held, *Marsh* is not limited to practices actually in existence at the time the Establishment Clause was enacted.

The Sixth Circuit recently applied *Marsh* to invocations given at public high school graduation ceremonies, and held that the invocations are not *per se* unconstitutional. *Stein v. Plainwell Community Schools,* 822 F.2d 1406 (6th Cir. 1987). The Sixth Circuit stated that "[t]he annual graduation exercises here are analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles." *Id.* at 1409. The invocations given at high school graduation ceremonies in *Stein* are indistinguishable from those at issue in the present case.

Similarly, the Seventh Circuit applied *Marsh* in holding that a "prayer room" in the Illinois State Capitol building does not violate the Establishment Clause. *Van Zandt v. Thompson,* 839 F.2d 1215 (7th Cir. 1988). The

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5. We recognize that this Court has stated that the *Marsh* analysis is "not useful in determining the proper roles of church and state in public schools." *Edwards v. Aguillard,* 482 U.S. 578, ..., 107 S. Ct. 2573, 2577 n.4 (1987). However, this statement only has reference to cases involving school classrooms at which attendance is mandatory and the student-teacher relationship is implicated. *See, e.g., Edwards,* 482 U.S. at ....., 107 S. Ct. at 2573 (classroom curriculum); *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985) (classes); *Jaffree,* 472 U.S. 38 (classroom moment of silence). Because the present case does not involve the classroom setting but instead a public ceremonial occasion, *Marsh* is applicable. *Stein,* 822 F.2d at 1409-10. Indeed, the present case is on the extreme periphery of the school setting.

Seventh Circuit rejected a narrow interpretation of *Marsh* as being "much too crabbed a view." *Id.* at 1219.

The Eleventh Circuit's decision here squarely conflicts with the Sixth and Seventh Circuit's interpretation of *Marsh*. The School District respectfully urges the Court to grant certiorari to resolve this conflict among the Circuits and thus to assure uniformity of decisions in this area. It is unthinkable that high schools in the Sixth Circuit can continue the tradition of having ceremonial invocations while those in the Eleventh Circuit cannot.

B. The Court of Appeals' Interpretation of the Lemon v. Kurtzman Test Has Been Rejected by This Court.

Ceremonial invocations also pass constitutional muster under a proper application of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon* the Court must consider:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-613 (citations omitted). In applying *Lemon* the Court has emphasized that "[i]n each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Ceremonial invocations fall on the "constitutional" side of this line.

This Court further emphasized in *Lynch* that it is error to "[f]ocus exclusively on the religious component

of any activity" since this "would inevitably lead to its invalidation under the Establishment Clause." *Id.* at 680. Instead, the focus of the inquiry must be on the conduct in the context of the activity as a whole. *See id.* at 679. When viewed in the overall context of a high school football game lasting approximately two hours and including the playing of the national anthem and other activities traditionally accompanying such an event, the equal access plan that permits a brief ceremonial invocation before the game begins is entirely consistent with the First Amendment.

1. The Court of Appeals' Decision Conflicts With This Court's Holding That the Existence of Nonreligious Means to Accomplish the Secular Purposes Is "Irrelevant."

The district court expressly found that the secular purposes of invocations are "to continue a custom and tradition of long-standing, to add a tone of solemnity and dignity to the proceedings and to remind the spectators and players of the importance of sportsmanship and fair play." App. at A57. The Jagers conceded in their opening brief in the Court of Appeals that the invocations have secular purposes and that those purposes are "undoubtedly sincere." The Court of Appeals did not find, and could not have properly found, the district court's findings to be clearly erroneous.

The Court of Appeals incorrectly concluded that despite the existence of these legitimate secular purposes, the invocations do not satisfy the first prong of the *Lemon* test because the School District could have accomplished these secular purposes "by requiring wholly secular inspirational speeches" rather than permitting invocations.

862 F.2d at 829 (App. A13). The Court of Appeals held that a state cannot use religious means to achieve legitimate secular purposes if there are also secular means to achieve those purposes. 862 F.2d at 830 (App. A14). This holding is based on an interpretation of the *Lemon* test that is directly contrary to *Lynch v. Donnelly*, 465 U.S. at 681 n.7.

In his dissent in *Lynch*, Justice Brennan set forth the theory advanced in the Court of Appeals' decision that:

> [A]ll of Pawtucket's "valid secular objectives can be readily accomplished by other means." Plainly, the city's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells that are already a part of Pawtucket's annual Christmas display.

Id. at 699-700 (footnotes omitted).

The Court rejected this argument:

> Justice Brennan argues that the city's objectives could have been achieved without including the creche in the display. *True or not, that is irrelevant.* The question is whether the display of the creche violates the Establishment Clause.

Id. at 681 n.7 (citation omitted and emphasis added). Indeed, under the reasoning of the Eleventh Circuit, the nativity scene at issue in *Lynch* would be unconstitutional because the city could achieve its secular purpose of celebrating the Christmas season by displaying only non-religious items such as Santa Claus and reindeers.

This Court and other federal courts have recognized that prayers *can* have a secular purpose. *See Lynch,* 465 U.S. at 693 (O'Connor, J., concurring);[6] *Stein v. Plainwell Community Schools,* 822 F.2d 1406, 1409 (6th Cir. 1987) (secular purpose of adding solemnity); *Bogen v. Doty,* 598 F.2d 1110, 1113 (8th Cir. 1979) (prayers at county commissioners' meetings have the secular purpose of establishing a solemn atmosphere and serious tone); *Grossberg v. Deusebio,* 380 F. Supp. 285, 289 (E.D. Va. 1974) (secular purpose of invocations at high school graduation ceremonies is ceremonial).

The cases upon which the Court of Appeals relied in support of its holding[7] were decided *prior to* this Court's decisions in *Marsh* and *Lynch.* The Court of Appeals' interpretation of *Lemon* is simply wrong. The Court should grant certiorari to correct this erroneous decision.

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6. Justice O'Connor expressed the opinion in *Lynch* that:

> Those government acknowledgments of religion [legislative prayers and opening court sessions with "God save the United States and this honorable court"] serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

465 U.S. at 693 (O'Connor, J., concurring).

7. *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983), *aff'd,* 472 U.S. 38 (1985), and *Karen B. v. Treen,* 653 F.2d 897 (5th Cir. Unit A Aug. 1981), *aff'd mem.,* 455 U.S. 913 (1982). The Court of Appeals relied on its own opinion in *Jaffree* rather than the Court's opinion in that case. *See* 862 F.2d at 830 (App. A14).

2. In Holding That the Invocations' Primary Effect Is to Advance Religion, the Court of Appeals Erroneously Focused Entirely on the Religious Aspect of Invocations.

Ceremonial invocations under the equal access plan also satisfy the second prong of *Lemon*, which is whether the principal or primary effect of the school's practice of having an invocation at its football games advances or inhibits religion. *See Lemon*, 403 U.S. at 612. In holding that the equal access plan was constitutional, the district court necessarily rejected plaintiffs' argument that the primary effect of invocations permitted by the plan will be to advance religion.[8]

As Chief Judge Roney stated in his dissenting opinion, "it cannot be said that such invocations advance religion in any significant way or convey a message of endorsement for a particular religious creed." 862 F.2d at 839 (App. A36). Indeed, ceremonial invocations do not endorse religion any more than legislative prayers, a city's display of a nativity scene, the expenditure of large sums of public money for textbooks supplied to students at church-sponsored schools, tax exemptions for church properties, or Sunday Closing Laws—all of which do not violate the Establishment Clause. *See Lynch*, 465 U.S. at 681-82; *Marsh*, 463 U.S. at 790-91.[9]

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8. The district court decided only that the equal access plan is facially constitutional and did not address the constitutionality of the plan as applied. *See supra* note 3.

9. The Chaplain of the United States Senate regularly gives invocations at events held in the Capitol Building and elsewhere that are attended by young people who are members of such groups as the United States Presidential Scholars, the Future Homemakers of America, and the United States Senate Youth Program. *See, e.g.*, Prayers Offered by the Chaplain of the

(Continued on following page)

Ceremonial invocations have both secular and religious components. The Court of Appeals' opinion erroneously emphasized *only* the religious component and failed to take into account that "some advancement of religion" may be constitutionally permissible. *Lynch*, 465 U.S. at 683. The *Lynch* Court opined that:

> We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid."

Id. (citations omitted). *See also Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973).

The Court of Appeals reasoned that because the invocations have a religious aspect, the invocations necessarily convey a message of endorsement of religion. Carried to a logical extreme, every challenged practice would be struck down under this reasoning: if there were no religious aspect, the practice would not have been challenged in the first place.[10]

Footnote continued—

Senate of the United States, S. Doc. No. 98-43, 98th Cong., 2d Sess. (1984). The Chaplain is paid, and the prayers are reprinted at government expense. It would indeed be incongruous if unpaid lay persons who volunteer to do so could not deliver brief ceremonial invocations, neutral in content, to accomplish legitimate secular purposes at football games in Douglas County, Georgia, at which attendance is entirely voluntary.

10. Judge Kenneth W. Starr of the United States Court of Appeals for the District of Columbia Circuit spoke on the

(Continued on following page)

Invocation speakers under the equal access plan will be randomly selected without regard to their religion or lack of religious belief. This approach is an even-handed and neutral application of the tradition of having invocations. There is no reasonable basis for assuming that the invocations permitted by this plan will convey a message of endorsement of religion.

In sum, the equal access plan for pre-game invocations is *facially constitutional* if considered under a proper application of the *Lemon* test.[11] The School District respectfully requests that the Court grant certiorari because the Court of Appeals' interpretation of the *Lemon* test is fundamentally inconsistent with controlling decisions of this Court.

Footnote continued—

subject, "The Relationship of Church and State: The Views of the Founding Fathers" at the Twelfth Annual Meeting of The Supreme Court Historical Society held on May 18, 1987. Near the close of his address, after referring to "attacks on historic practices [such] as . . . prayers at public events and the like," he stated:

> [I]t is useful to remember that it is the evil of *compulsion* at which the Establishment Clause was aimed in a pluralist society. *The question for us as a Nation is whether in the name of tolerance and sensitivity, we are in danger of inadvertently entering an age of intolerance, thinking—strangely, oddly—that religion is like discrimination, something to be eliminated from public life, root and branch.*

K. W. Starr, *The Relationship of Church and State: The Views of the Founding Fathers* in The Supreme Court Historical Society Yearbook 24, 37 (1987) (emphasis in original). We submit that focusing attention solely on the religious component of an activity, as the Court of Appeals did here, would almost inevitably lead to the danger cited by Judge Starr, *i.e.*, the elimination of religion from public life.

11. The Court of Appeals held that the invocations satisfy the third part of *Lemon*. The Court of Appeals recognized that under the equal access plan, there is *no entanglement* between church and state. 862 F.2d at 831 (App. A17).

ALTERNATIVE PRAYER

As an alternative to granting the writ at this time, the School District respectfully requests the Court to hold this Petition pending the issuance of the Court's decision in *County of Allegheny v. ACLU*, Nos. 87-2050, 88-90, and 88-96 (U.S. cert. granted Oct. 3, 1988). The issue in *County of Allegheny v. ACLU* is whether Christmas displays that include a religious symbol violate the Establishment Clause. Oral argument has been held, but no order has been entered as of the date of filing this Petition.

If the constitutionality of the Christmas displays is upheld, the Court's decision would be further support for the erroneousness of the Court of Appeals' decision here. Indeed, a decision holding the display of a religious symbol at the very heart of government to be constitutional would strongly suggest that the traditional ceremonial invocations that are the subject of this Petition are similarly permissible acknowledgments of this nation's religious heritage.

The Court should grant the writ even if the Christmas displays in *County of Allegheny v. ACLU* are held to be a violation of the Establishment Clause because the Court's decision in *County of Allegheny v. ACLU* would leave open other important constitutional questions which should be resolved by the Court. The applicability of *Marsh v. Chambers* to ceremonial invocations given at school-related functions outside the classroom setting is not before the Court in *County of Allegheny* and thus would necessarily be left open by the Court's decision in that case. As explained above, this question should be decided by the Court to resolve the conflict

among the Circuits. In addition, a ruling against the Christmas displays would not control the issue of the constitutionality of ceremonial invocations under the *Lemon v. Kurtzman* test. The School District respectfully urges the Court to grant certiorari to review these important questions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1989

APPENDIX

APPENDIX I

Doug JAGER and William Jager,
Plaintiffs-Appellants,
Cross-Appellees,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, et al.,
Defendants-Appellees,
Cross-Appellants.

Doug JAGER, William Jager,
Plaintiffs-Appellees,
Cross-Appellants,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,
Douglas County Board of Education,
Defendants-Appellants,
Cross-Appellees.

Nos. 87-8522, 87-8719.

United States Court of Appeals,
Eleventh Circuit.

Jan. 3, 1989.

Action was brought challenging practice of having invocations given prior to public high school football games. The United States District Court for the Northern District of Georgia, No. C86-2037A, G. Ernest Tidwell, J., granted relief in part, and appeals were taken. The Court of Appeals, Johnson, Circuit Judge, held that: (1) challenge to plan under which protestant ministers

gave the invocations was not mooted by cessation of the practice; (2) that practice was unconstitutional; (3) practice of having invocations given prior to a public high school football game by members of groups desiring to participate in a "free access" program with respect to the invocations violated the First Amendment; and (4) violation was not de minimis.

Affirmed in part and reversed in part and remanded.

John W. Peck, Senior Circuit Judge, sitting by designation, filed an opinion concurring in the result.

Roney, Chief Judge, filed a dissenting opinion.

1. Constitutional Law (Key) 84(1)

As long as state action is present, the reach of establishment clause is not limited by a lack of statutory authorization for the action complained of. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const.Amend. 1.

2. Constitutional Law (Key) 84.5(3)

Constitutional challenge to practice of giving religious invocations prior to high school football games was not controlled by United States Supreme Court decision dealing with invocations prior to legislative sessions but, rather, was governed by the *Lemon* test focusing on whether the challenged action has a secular purpose, whether its primary effect is one which neither advances nor inhibits religion, and whether it results in an excessive entanglement of government with religion. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const.Amend. 1.

3. Constitutional Law (Key) 84.5(3)
Schools (Key) 165

Practice of having invocations delivered prior to public high school games by representatives of organizations desiring to participate in the invocation plan had an essentially religious purpose and had the primary effect of advancing religion, and thus violated the First Amendment, even though the plan, on its face, did not entangle the school district with religion. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const. Amend. 1.

4. Constitutional Law (Key) 84.5(3)
Schools (Key) 165

When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation, and thus violates the First Amendment. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const. Amend. 1.

5. Constitutional Law (Key) 84.5(1)

Fact that complaining individual's presence at event in which invocation was given was voluntary is not relevant establishment clause analysis; establishment clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const.Amend. 1.

6. Constitutional Law (Key) 84.5(3)

Violation of the establishment clause which resulted from practice of giving religious invocations prior to public high school football games was not de minimis even though the invocations lated only 60 to 90 seconds. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const.Amend. 1.

7. Federal Courts (Key) 12

Defendant's voluntary cessation of challenged practice will not ordinarily render an action moot, because the defendant is free to return to his old ways. (Per Johnson, Circuit Judge, with one Judge concurring in the result.)

8. Federal Courts (Key) 13.30

Fact that school district had voluntarily ceased practice of having pregame religious invocations delivered by protestant ministers did not moot challenge where the elimination of the practice was not the result of formal board policy but, rather, the result of a change of practice by individual principals. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const. Amend. 1.

9. Constitutional Law (Key) 84.5(3)
Schools (Key) 165

Practice of having protestant ministers give religious invocation prior to public high school games violated First Amendment. (Per Johnson, Circuit Judge, with one Judge concurring in the result.) U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and PECK*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case involves invocations which are delivered prior to public high school football games in Douglas County, Georgia. These football games are school-sponsored activities which are played at a stadium owned by the school system. The schools furnish the equipment used by the participants, and the coaches who supervise these activities are employed by the school system. Taxpayer funds are used to pay the operating costs for the stadium lights and public address system. We hold that the practice of beginning these games with an invocation violates the Establishment Clause of the First Amendment.

I. FACTS

In the fall of 1985, Doug Jager, then a member of the Douglas County High School marching band,[1] objected to his school principal about the practice of having pregame invocations delivered at home football games.[2]

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*Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

1. Doug Jager has now graduated from high school. He and his father, William Jager, continue this suit as taxpayers and as people who attend the football games. In addition, Mark Jager (William's other son) attends Douglas County High School and plays in the marching band.

2. Pregame invocations have been given at Douglas County High School football games at least since 1947. From 1947 to September 1986, an announcer would introduce the invocation speaker, usually identifying the church of affiliation. Stu-

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The invocations often opened with the words "let us bow our heads" or "let us pray" and frequently invoked reference to Jesus Christ or closed with the words "in Jesus' name we pray." These invocations conflict with the Jagers' sincerely held religious beliefs.[3] The Douglas County High School principal informed the band director of Doug Jager's objections to the prayers. The Band director proceeded to lecture Doug on Christianity.

On June 2, 1986, Douglas County School Superintendent Kathryn Shehane, the school system attorney, the Jagers and their counsel, and Reverends Jamie E. Jenkins and Donald Mountain of the Douglas County Ministerial Association ("DCMA") met and discussed two alternative proposals for modifying the invocation practices: an inspirational wholly secular speech and an "equal access" plan that would retain some religious content. The Jagers rejected the equal access approach, and notified the school system attorney that the secular inspirational speech was the only feasible alternative to the invocation practice. Upon the Jagers' rejection of the equal access plan, Reverends Jenkins and Mountain drafted a compromise proposal. The stated purpose of the alternative draft was to "perpetuate and regulate the traditional invocation as part of the opening ceremonies

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Footnote continued—

dent government initially invited invocation speakers. Starting in 1950, local ministers began to give the invocations. In the early 1970s, an assistant football coach delegated the task of furnishing invocation speakers to Reverend Leon Jeffords, a Presbyterian clergyman. From the early 1970s through 1986, Jeffords recruited invocation speakers through the Douglas County Ministerial Association, a group of ordained clergy whose membership consisted exclusively of Protestant Christian ministers. With perhaps five exceptions, Protestant Christian clergymen gave every invocation delivered at Douglas County High School games from 1974 to 1986.

3. The Jagers are Native Americans.

of school athletic events." R1-24-16. In August 1986, the plaintiffs agreed to reconsider the Jenkins/Mountain version of the equal access plan if prayers voluntarily ceased at football games in the interim.

In September 1986, Superintendent Shehane met with the principals of Douglas County high schools. The group decided to proceed with pregame invocations pursuant to the equal access plan. On September 15, 1986, the high school principals informed their schools that the equal access plan, which the district court found to be coextensive with the Jenkins/Mountain plan, would govern future games, including those scheduled for September 26, 1986.[4]

Under the terms of the equal access plan, all school clubs and organizations can designate club members to give invocations, and any student, parent or school staff member can seek to deliver an invocation. The plan specifies that the student government will randomly select the invocation speaker, and no ministers will be involved in selecting invocation speakers or in delivering invocations. In addition, the schools will not monitor the content of the invocations.[5]

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4. Although the Douglas County Board of Education never formally adopted a policy concerning pregame invocations, the School District does not deny that the school superintendent met with the school principals and instructed them to follow the equal access plan. The school superintendent testified that, after she and the principals decided to proceed in accordance with the equal access plan, the principals informed their respective student bodies that the equal access plan would be the method by which pregame invocation speakers would be chosen. R5-90-91. Therefore, the plan was enacted by those with authority to do so.

5. As noted above, the district court found that the School District's equal access plan was "coextensive" with the Jenkins/Mountain plan. The School District does not dispute this. In

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On September 19, 1986, the Jagers filed a complaint in the United States District Court for the Northern District of Georgia. The district court issued a temporary restraining order enjoining the Douglas County School District ("the School District") from conducting or permitting religious invocations prior to any athletic event at the school stadium.

The case was tried to the district court in November 1986. On February 3, 1987, the district court (1) declared the pregame invocations unconstitutional, (2) denied the Jagers' request for a permanent injunction, (3) rejected the Jagers' claim based on the Free Exercise of Religion Clause of the First Amendment,[6] and (4) rejected the Jagers' claim that the School District violated the Georgia Constitution.

After the School District filed a Motion for Clarification, the district court entered an additional order in which it held that the equal access plan was constitutional on its face and did not violate the Establishment Clause. The court expressly declined to determine whether the equal access plan was unconstitutional as applied. The district court denied the Jagers' request for declaratory and injunctive relief relating to the equal access plan.

Footnote continued—

fact, the Jenkins/Mountain plan, which stated that its purpose was to "perpetuate and regulate the traditional invocation as part of the opening ceremonies of school athletic events," was introduced into evidence as Plaintiff's Exhibit 2. At trial, the school superintendent referred to the Jenkins/Mountain plan (that is, Exhibit 2) as the equal access plan which she and the principals enacted. *See* R5-90-91. Thus, the specifics of the equal access plan are defined in the record.

6. The Jagers do not appeal this determination.

On June 2, 1987, the district court determined that the Jagers were "prevailing parties" under 42 U.S.C.A. § 1988 and thus were entitled to attorneys' fees. On August 31, 1987, the district court awarded attorneys' fees, after decreasing the amount sought by the Jagers by 25%. The appeals and cross-appeals from the district court's orders on the merits and on the question of attorneys' fees were then consolidated.

II. DISCUSSION

A. *Equal Access Plan's Facial Validity*

The district court held that the equal access plan, which involves the random selection of an invocation speaker, was constitutional on its face. The Jagers challenge this holding on appeal.

[1] The Establishment Clause of the First Amendment forbids the enactment of any law or practice "respecting an establishment of religion."[7] U.S. Const. Amend. I. The religion clauses of the First Amendment require that states "pursue a course of complete neutrality toward religion." *Wallace v. Jaffree,* 472 U.S. 38, 60, 105 S.Ct. 2479, 2491, 86 L.Ed.2d 29 (1985) ("*Jaffree II*"). To determine whether state action embodies the neutrality that comports with the Establishment Clause, this Court must apply a three-pronged analysis. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111,

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7. The Establishment Clause applies to the states. *Everson v. Board of Education,* 330 U.S. 1, 8, 67 S.Ct. 504, 507-508, 91 L.Ed. 711 (1947); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). In addition, as long as state action is present, the reach of the Establishment Clause is not limited by a lack of statutory authorization. *See Smith v. Board of School Comm'rs,* 827 F.2d 684, 689 n. 3 (1987).

29 L.Ed.2d 745 (1971). We must ask whether (1) the Douglas County School Superintendent and the school principals had a secular purpose for adopting the equal access plan, (2) the plan's primary effect is one that neither advances nor inhibits religion, and (3) the plan does not result in an excessive entanglement of government with religion. *Id.* at 612-13, 91 S.Ct. at 2111. State action violates the Establishment Clause if it fails to meet any of these three criteria. *Edwards v. Aguillard*, ... U.S. ....., 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987).

The School District argues that the *Lemon* test does not apply here. Instead, the School District contends that *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), provides the standard for determining whether the equal access plan violates the Establishment Clause. In *Marsh*, the Supreme Court upheld Nebraska's practice of commencing state legislative sessions with a prayer delivered by a chaplain employed by the state. In refusing to declare Nebraska's legislative invocation unconstitutional, the Court relied on the "unique history" associated with the practice of opening legislative sessions with a prayer. *Id.* at 791, 103 S.Ct. at 3335-3336. The practice existed at the time of the adoption of the First Amendment and had continued in many states to the present. *See id.* at 792, 103 S.Ct. at 3336 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."). Since the Continental Congress and the First Congress opened their sessions with prayers, the *Marsh* Court concluded that the drafters of the Establishment Clause

undoubtedly perceived no threat from legislative prayer and did not intend to prohibit legislative invocations. *Id.* at 791, 103 S.Ct. at 3335-3336.

[2] Because *Marsh* was based on more than 200 years of the "unique history" of legislative invocations, it has no application to the case at bar. The instant case involves the "special context of the public elementary and secondary school system," *Edwards,* 107 S.Ct. at 2577, in which the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause." *Id.* As the Supreme Court recently explained:

> [t]he *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers,* where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually non-existent at the time the Constitution was adopted.

Edwards, 107 S.Ct. at 2577 n. 4 (citations omitted).[8] Similarly, the present case does not lend itself to *Marsh*'s historical approach because invocations at school-sponsored football games were nonexistent when the Consti-

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8. At the end of this past term, the Supreme Court applied the *Lemon* test in a case involving federal funding of religiously affiliated organizations that operate programs to help reduce the problems associated with teenage pregnancy. *See Bowen v. Kendrick,* ..... U.S. ....., 108 S.Ct. 2562, 101 L.Ed. 2d 520 (1988).

tution was adopted. Therefore, the *Lemon* test guides this Court's analysis in the case at bar.[9]

1. *Secular Purpose*

[3] The first prong of the *Lemon* test asks whether the challenged practice had a secular purpose. "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.' " *Jaffree II*, 472 U.S. at 56, 105 S.Ct. at 2489 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)). Clearly, the equal access plan in the case at bar was adopted with the actual purpose of endorsing and perpetuating religion.

The district court found that pregame invocations serve four purposes: (1) to continue a longstanding custom and tradition, (2) to add a solemn and dignified

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9. The Sixth Circuit recently held that *Marsh* governed the analysis of the validity of invocations and benedictions at high school graduation ceremonies. *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir.1987). However, *Stein* did not address the limitations placed on *Marsh* by the Supreme Court in *Edwards*. In fact, *Stein* did not even mention *Edwards*. The Sixth Circuit overlooked that *Marsh* was grounded in historical practice which dates from the time of the drafting of the Constitution. As *Edwards* indicates, *Marsh* created an exception to the *Lemon* test only for such historical practice. There is no rationale for applying this limited, historically-based exception to religious invocations that occur prior to high school football games.

Likewise, *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir.1988), is inapposite here. *Van Zandt* involved an Establishment Clause challenge to the Illinois state legislature's decision to provide a prayer room in the state capitol building. The Seventh Circuit applied the *Marsh* test and concluded that there was no violation of the Establishment Clause. The *Van Zandt* court's decision to extend the *Marsh* test to the case of a prayer room in the state capitol building can be understood because both cases dealt with legislative prayer issues. However, *Van Zandt*'s adoption of the *Marsh* test is irrelevant in the present case involving public schools.

tone to the proceedings, (3) to remind the spectators and players of the importance of sportsmanship and fair play,[10] and (4) "to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity." R1-24-19. The School District could serve all of its cited secular purposes by requiring wholly secular inspirational speeches about sportsmanship, fair play, safety, and the values of teamwork and competition.[11] Indeed, the Jagers offered to accept a pregame invocation consisting of a secular inspirational speech. Since

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10. The district court issued a temporary restraining order against invocations during the 1986 season. Despite the fact that no invocations were delivered during the 1986 season, the district court found that "the School System experienced no measurable increase in fan violence, rowdiness or unsportsmanlike behavior." R1-24-18.

11. The district court found that the School District cited no secular purposes for the invocations until after the Jagers filed suit. In fact, at the September 23, 1986 hearing which ultimately led to the district court's issuing a temporary restraining order, the following conversation occurred between the court and the school system attorney:

> COURT: Does the practice of invocations in the Douglas County stadium that we are talking about have any secular purpose?
>
> MR. HELMS: *It has no secular purpose whatsoever, Your Honor.*

R4-33 (emphasis added). Attorney Helms went on to explain that:

> The whole football program is wholly secular from start to finish, and I submit that the . . . injection or the beginning of that two or three hour period with the invocation does not convert the whole program to a non-secular event.

Id. Although Helms' explanation suggests that he did not mean to concede that one of the prongs of the *Lemon* test was not satisfied, his statement is consistent with our reading of the record. While his admission does not constitute conclusive evidence that the pregame invocations fail the first prong of the *Lemon* test, the statement reinforces our conclusion that the actual purpose behind both the equal access plan and the prior invocation practice was to endorse Protestant Christianity.

the School District rejected this compromise even though it would have fulfilled the three secular purposes of pregame invocations, it is clear that the School District was most interested in the fourth purpose served by the invocations. That is, the School District wanted to have invocations that publicly express support for Protestant Christianity.

"The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests." *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. Unit A 1981), *aff'd mem.,* 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed. 2d 455 (1982). In choosing the equal access plan, the School District opted for an alternative that permits religious invocations, which by definition serve religious purposes, just like all public prayers. *See Jaffree v. Wallace,* 705 F.2d 1526, 1534 (11th Cir.1983) ("Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied"), *aff'd,* 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) ("*Jaffree I*"). The School District's rejection of the alternative of wholly secular invocations makes it very clear that the School District's actual purpose in having pregame invocations was religious. Consequently, the equal access plan fails to survive the *Lemon* test.

The conclusion that an intrinsically religious practice cannot meet the secular purpose prong of the *Lemon* test finds support in other cases. In *Stone v. Graham,* 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the Supreme Court held that Kentucky's statute requiring the posting of a copy of the Ten Commandments in all public classrooms had no secular purpose. The Kentucky legislature required the following notation in small print

at the bottom of each copy of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 41, 101 S.Ct. at 193 (quoting Ky.Rev.Stat. § 158.178 (1980)). Nonetheless, the Supreme Court held that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41, 101 S.Ct. at 194 (footnote omitted). Likewise, the facts in the present case demonstrate that, although the School District emphasized at trial the secular purposes behind the pregame invocations, the pre-eminent purpose behind having invocations was to endorse Protestant Christianity. This is prohibited by the Establishment Clause. *See Abington School Dist. v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963) (daily reading of Bible verses and Lord's Prayer in the public schools held unconstitutional, despite school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature"); *Graham v. Central Community School District,* 608 F.Supp. 531, 535 (S.D.Iowa 1985) (striking down commencement invocation and benediction for lack of secular purpose). In light of the controlling case law and the nature of the challenged practice, we hold that, because the equal access plan fails to satisfy the first prong of the *Lemon* test, the plan violates the Establishment Clause of the First Amendment.

2. *The Primary Effect*

Even assuming, *arguendo,* that the equal access plan survives the first prong of the *Lemon* test, we would still find that the plan is facially unconstitutional because it fails the primary effect prong of the *Lemon* test. "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Jaffree II,* 472 U.S. at 56 n. 42, 105 S.Ct. at 2489 n. 42 (quoting *Lynch,* 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring)).

[4] In the present case, as noted above, the School District could satisfy its secular objectives by prescribing a strictly secular invocation. The equal access plan, however, permits religious invocations. When a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation. *See Jaffree I,* 705 F.2d at 1534-35 ("The primary effect of prayer is the advancement of ones religious beliefs."). This message becomes even clearer when the context of these pregame prayers is understood. In the past, pregame invocation speakers at the Douglas County High School, with very few exceptions, have been Protestant Christian ministers. In addition, Protestant Christianity is the majority religious preference in Douglas County. Therefore, the likely result of the equal access plan will be the continuation of Protestant Christian invocations, which have been delivered since 1947. Moreover, the equal access plan places those attending football games in the position of participating

in a group prayer. Consequently, the plan violates the primary effect prong of the *Lemon* test. *Accord Graham*, 608 F.Supp. at 536 ("invocation and benediction portions of defendant's commencement exercises have as their primary effect the advancement of the Christian religion").

3. *Entanglement*

On the face of the equal access plan, the School District is not entangled with religion at all. The School District does not monitor the content of the invocations, and the DCMA will no longer choose the invocation speakers or deliver the pregame prayers. Nonetheless, the lack of entanglement cannot save the equal access plan because the plan violates the first two prongs of the *Lemon* test.

4. *The School District's Arguments*

The School District sets forth several arguments for distinguishing school prayer cases, claiming that these distinctions permit a finding that religious invocations at high school football games are constitutional. The School District first argues that the school prayer cases are not implicated here because pregame invocations occur outside the instructional environment of the classroom. This argument is meritless. Even though not occurring in the classroom, the invocations take place at a school-owned stadium during a school-sponsored event. In *Doe v. Aldine Ind. School Dist.*, 563 F.Supp. 883 (S.D.Tex. 1982), the United States District Court for the Southern District of Texas rejected the argument that the School District asserts here. In *Doe*, a public high school sponsored extracurricular activities at which a prayer was sung. The defendants argued that the prayer did not

violate the Establishment Clause because it occurred outside the classroom. The *Doe* court rejected this argument:

> Pep rallies, football games, and graduation ceremonies are considered to be an integral part of the school's extracurricular program and as such provide a powerful incentive for students to attend. . . . "[I]t is the Texas compulsory education machinery that draws the students to the school event and provides any audience at all for the religious activities. . . ." Since these extracurricular activities were school sponsored and so closely identified with the school program, the fact that the religious activity took place in a nonreligious setting might create in a student's mind the impression that the state's attitude toward religion lacks neutrality.

Id. at 887 (citation omitted). The *Doe* court's reasoning applies equally well in the present case.

The School District next contends that football invocations do not invoke the teacher-student relationship, and are directed to a far less impressionable audience of adults and sixteen to eighteen year olds. However, the equal access plan does permit teachers to deliver religious invocations, thereby impacting on the teacher-student relationship. Furthermore, to persons of any age who do not believe in prayer, religious invocations permitted by the equal access plan convey the message that the state endorses religions believing in prayer and denigrates those religions that do not. If these prayers are delivered by authority figures, such as teachers, as is possible under the equal access plan, the message endorsing prayer becomes even stronger.

[5] The School District argues further that the invocations are constitutional because they are given at public events at which attendance is entirely voluntary. Courts upholding invocations at graduation ceremonies have stressed that attendance is voluntary. *See, e.g., Wood v. Mt. Lebanon Township School District,* 342 F.Supp. 1293, 1294 (W.D.Pa.1972). However, the Supreme Court and this Court have *not* held that public prayer becomes constitutional when student participation is purely voluntary. *See Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-1267, 8 L.Ed.2d 601 (1962) ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause"); *see also Karen B. v. Treen,* 653 F.2d at 902. The School District attempts to distinguish these cases on the ground that they involved students who were compelled by law to be in attendance in the classroom where prayer took place. The School District suggests that, because attendance at football games is voluntary, a constitutional violation is avoided. This argument lacks merit because whether the complaining individual's presence was voluntary is not relevant to the Establishment Clause analysis. *Bell v. Little Axe Ind. School Dist. No. 70,* 766 F.2d 1391, 1405 (10th Cir.1985). The Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual.

[6] The School District's final attempt to distinguish the school prayer cases centers on the contention that the invocations constitute a *de minimis* violation of the Establishment Clause because they last 60 to 90 seconds. *See Grossberg v. Deusebio,* 380 F.Supp. 285, 290 (E.D.Va.1974) (no Establishment Clause violation

"from the brief periods allotted to the invocation and benediction contemplated as part of the graduation ceremony"). This approach is flawed. It is "no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Schempp,* 374 U.S. at 225, 83 S.Ct. at 1573. The Establishment Clause does not focus on the amount of time an activity takes, but rather examines the religious character of the activity. *See Hall v. Bradshaw,* 630 F.2d 1018, 1021 (4th Cir.1980), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1480, 67 L.Ed.2d 613 (1981). As the Fourth Circuit recognized in *Bradshaw,* "[a] prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause." *Id.* at 1021.

None of the arguments offered by the School District are persuasive in the present case. Each alleged distinction overlooks the single fact that a state or its subdivision cannot endorse or advance religion. Nor can a state use religious means to achieve secular purposes where, as here, secular means exist to achieve those purposes.

In short, the equal access plan is unconstitutional because it has a religious purpose and a primary effect of advancing religion. By using a purely secular invocation, the School District could avoid any problems of entanglement, fulfill its secular purposes, and not advance religion, thereby complying with the requirements of *Lemon* and its progeny. Because the School District rejected the alternative of a purely secular pregame speech, and instead adopted a plan which fails to satisfy the *Lemon* test, we hold that the equal access plan is unconstitutional on its face.

B. *Invocations Before Equal Access Plan Implemented*

The district court declared that the pregame invocation system that was in place prior to the "adoption" of the equal access plan[12] was unconstitutional. The School District contends that the question of the constitutionality of the invocation practices as they existed prior to the equal access plan was moot and, therefore, the district court lacked jurisdiction to make such a declaration. Alternatively, the School District argues that, if the issue was not moot, the district court erroneously declared the prior pregame invocation practice to be unconstitutional.

1. *Mootness*

The School District first raised mootness as a jurisdictional impediment when the district court prepared to award attorneys' fees to the Jagers. The district court rejected the School District's argument because it was not absolutely clear that the prior practice of having religious invocations given by DCMA ministers would not recur. *See United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).

[7] Ordinarily, the defendant's voluntary cessation of a challenged practice will not moot an action because "the defendant is free to return to his old ways." *United States v. W.T. Grant Co.,* 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). In the case at bar, the district court held that:

> the issue of the constitutionality of the pre-"equal access" plan practice of pregame prayer is not moot.

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12. As noted above, the Douglas County Board of Education has never formally adopted the equal access plan. Rather, the school superintendent and the principals decided to follow the plan at future games.

> In fact, the practice was temporarily enjoined by this court prior to adjudication on the merits. At no point during the hearing on the motion by plaintiffs for a temporary restraining order or during the trial on the merits was the mootness argument raised. Both plaintiffs and defendants have steadfastly litigated the allegedly moot issue.

R2-48-3.

In arguing that the district court's holding was error, the School District seeks to distinguish *Concentrated Phosphate* and *W.T. Grant*. It contends that voluntary cessation in those cases occurred *after* the complaint was filed, whereas the Douglas County School Superintendent and the school principals decided to implement the equal access plan four days before the Jagers filed their complaint. This argument is unavailing. In *Hall v. Board of School Comm'rs*, 656 F.2d 999, 1000 (5th Cir. Unit B Sept. 1981), this Court held that the defendant school board's voluntary cessation of morning devotionals upon learning that a lawsuit was going to be filed did not moot the plaintiff's Establishment Clause challenge to the practice. The *Hall* Court noted that the defendant school board had disputed the constitutionality of the practice up to the day of trial, when defense counsel indicated for the first time that the board had no intention of reviving the devotionals. Additionally, although the school superintendent knew that the practice was unconstitutional and had informed the school principals of this fact, he made no further attempt to ensure that all schools discontinued the practice. *Id.*

[8] *Hall* controls the mootness issue in the present case. Under the imminent threat of the Jagers' lawsuit,

the School District voluntarily ceased the practice of having pregame religious invocations delivered by Protestant ministers, and it implemented the equal access plan. However, the equal access plan was merely implemented by the school principals. It was not a formal policy adopted by the School District or the Douglas County Board of Education, and the defendants never promised not to resume the prior practice.[13] In fact, the defendants continue to press on appeal that the voluntarily ceased conduct should be declared constitutional. Thus, as in *Hall*, the controversy concerning the prior invocation practices is not moot.

Because the School District's posture on appeal suggests it may revert to the practices it engaged in prior to the development of the equal access plan, the present case is distinguishable from *Saladin v. City of Milledgeville*, 812 F.2d 687, 693 (11th Cir.1987). In *Saladin*, this Court held an action moot where the City voluntarily ceased displaying an official seal in which the word "Christianity" appeared, and it promised not to display the seal again in the future. Importantly, the Court noted that there was no indication that the City would break its word. *Id.* Conversely, in the present case, there is no indication that the School District will refrain from resuming its forty year old practice of having clergy deliver religious invocations before high school football games. Therefore, because *Hall*, not *Saladin*, controls the

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13. Superintendent Shehane stated that, if the schools were permitted to continue football invocations, she would "encourage" the school principals to adhere to the equal access plan. Since the school principals control access to the public address system at football games, there is no guarantee that the practice of having religious invocations delivered by ministers will not resume.

question of mootness, we will reach the merits of the Jagers' challenge to the pre-equal access plan practices.

2. *Merits*

[9] The School District appeals the district court's declaration that the practice of having ministers give religious invocations violated the Establishment Clause. However, under the *Lemon* test,[14] this argument is without merit. First, the invocations were prayers, delivered by ministers, and thus fail the secular purpose prong of the *Lemon* test for the reasons set forth in Part A, *supra*. Second, the primary effect of advancing religion was clear for the reasons given by the district court: "[o]ne of the effects of the prior practices in regard to invocations was to create the appearance or impression that the school system endorsed Protestant Christianity." R1-24-19. The School District labels this finding clearly erroneous, but such a finding is inescapable where the person giving the invocation was identified by name and, frequently, by church affiliation. Third, excessive entanglement occurred because the School District delegated the authority to deliver invocations and to choose invocation speakers to the DCMA, a Protestant ministerial group. We therefore hold that the prior practice violated the Establishment Clause.[15]

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14. The School District again urges that *Marsh* should govern this Court's analysis. This argument fails for the reasons set forth in Part A, *supra*.

15. The Jagers also alleged a violation of article I, section 2, paragraph 7 of the Georgia Constitution, which provides:

> No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Because we hold that both the equal access plan and the pre-plan practices violated the Establishment Clause of the First Amendment to the United States Constitution, we find it unnecessary to decide the state constitutional issue.

C. *Attorney Fees*

On June 2, 1987, the district court determined that the Jagers were a "prevailing party" within the meaning of 42 U.S.C.A. § 1988. On August 31, 1987, the district court awarded the Jagers approximately $66,000, consisting of attorneys' fees and costs. The plaintiffs' attorneys had submitted a figure of approximately $71,000 for attorneys' fees; however, the district court reduced this figure by 25%, for time related to the unsuccessful equal access plan claim. Because we find in favor of the plaintiffs on the equal access plan claim, we remand to the district court to determine an attorneys' fee award in light of this holding.

III. CONCLUSION

In sum, we REVERSE the district court's order declaring the equal access plan constitutional on its face, and we AFFIRM the lower court's order declaring that the pregame invocations were unconstitutional. Because we award relief to the plaintiffs on both of their Establishment Clause claims, we REMAND to the district court to determine the amount of attorneys' fees to be awarded.

JOHN W. PECK, Senior Circuit Judge, concurring:

I concur in the result reached by the majority and with the choice of legal authority to support its position but write separately to express the haunting thought that the equal access plan comes across to me as a thinly veiled attempt to continue the forty year old traditional pre-game prayer format found unconstitutional by the district court. Indeed, the purpose statement by the Reverends Jenkins and Mountain, and apparently accepted by the superintendent, virtually assures the link with

that tradition. The "equal access plan" is presented in fragmentary form in the record and we know of its contents principally from what the district court tells us it is in its February 3 order. Its sole content is the random selection of the speakers.

Perhaps even more enlightening is what the description does not include. It does not say that the content of the invocation will be wholly inspirational or purely secular or non-religious based. It is disturbing to speculate that the framers of the "plan" appear to have been counting on the fact that indeed it would not be so. Indeed the school officials rejected a wholly inspirational, secular concept proposed by the Jagers. A random selection of speakers in this case does not result in a variety of viewpoints or beliefs in an area in which there is a long-standing preponderance of adherence to Christian Protestantism.

Nevertheless, I concur in the result because despite the imprecision of the components, a study of the record has convinced me that the basic, underlying intentions of the parties must necessarily be essentially as determined by the district court in its original order and by the majority opinion.

RONEY, Chief Judge, dissenting:

I respectfully dissent. Realizing that the Court here has tried to faithfully follow the controlling authorities in this very difficult field of constitutional law, I nevertheless think that it has pushed the Establishment Clause further than it needs to be pushed to preserve the rights there sought to be protected, and that the district court properly determined that the facts here do not transgress the admonition against making a "law respecting the establishment of religion."

Before the opening kick-off at high school football games in Douglas County, Georgia, a minister, or more recently, a randomly selected student, parent or faculty member, delivers an "invocation." The majority holds that this practice violates the Establishment Clause. I am unwilling "to press the concept of separation of Church and State to these extremes," *Zorach v. Clauson,* 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952). I would affirm the district court's decision that the equal access plan violates neither the Georgia nor the United States Constitution; I would hold that the controversy involving the school's traditional practice was moot and vacate the declaratory decree on that issue; and I would reverse the plaintiffs' attorney's fee award on the ground that plaintiffs were not the prevailing party.

Constitutionality of Equal Access Plan

Establishment Clause cases present the difficult task of attempting to reconcile the constitutional prohibition against law respecting the establishment of religion with the American national identity as "a religious people whose institutions presuppose a Supreme Being." *Zorach,* 343 U.S. at 313, 72 S.Ct. at 684. Out of the "tangle of establishment clause doctrine," *Van Zandt v. Thompson,* 839 F.2d 1215, 1218 (7th Cir.1988), emerge two distinct methods of analysis for such cases. The most established of these is the three-part inquiry formalized in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971). Under this analysis, a challenged practice will be upheld if: (1) it has a secular purpose; (2) its primary effect is neither to advance nor inhibit religion; and (3) it does not foster excessive Government entanglement in religion. *Id.* at 612-13, 91 S.Ct. at 2111.

The Supreme Court, however, has refused to be "confined to any single test or criterion in this sensitive area," *Lynch v. Donnelly,* 465 U.S. 668, 679, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984), and in a recent case, *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the Court developed an alternative approach to Establishment Clause challenges. This approach, based on history and tradition, simply holds that there are certain practices which, although religious in nature, are not an establishment of religion or a step toward establishment, but are rather a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792, 103 S.Ct. at 3336. In *Marsh,* the Court upheld the Nebraska Legislature's use of a chaplain, hired and paid by the State, to deliver invocations at each session.

The scope of *Marsh* has not been defined. The fact that the *Lemon* analysis was employed in *Wallace v. Jaffree,* 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) and *Edwards v. Aguillard,* ..... U.S. ....., 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), cases decided after *Marsh* involving Establishment Clause challenges in the public school context, indicates that *Marsh* is of limited utility in dealing with the issue of prayer in schools. *Edwards,* 107 S.Ct. at 2577 n. 4 ("[*Marsh*'s] historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."). *Accord Graham v. Central Community School Dist. of Decatur County,* 608 F.Supp. 531, 535 (S.D.Iowa 1985) ("*Marsh* decision is a singular Establishment Clause decision that rests on the 'unique history' of legislative prayer, and the holding of that case is clearly limited to the legislative setting."); *Bennett*

v. Livermore Unified School Dist., 193 Cal.App.3d 1012, 238 Cal.Rptr. 819 (1987); *Kay v. David Douglas School Dist. No. 40*, 79 Or.App. 384, 719 P.2d 875 (1986), *vacated as moot*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, ... U.S. ....., 108 S.Ct. 740, 98 L.Ed.2d 775 (1988). *See also Smith v. Board of School Comm'rs of Mobile County*, 827 F.2d 684, 689 (11th Cir.1987) (noting that *Lemon* test applies to Establishment Clause cases in public school setting).

To note that there are limits on the applicability of the *Marsh* analysis does not indicate, however, that the analysis is irrelevant to Establishment Clause cases. The principles announced in *Marsh* have been employed in recent decisions by the Sixth and Seventh Circuit Courts of Appeals. In *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir.1988), the court found that *Marsh* controlled an Establishment Clause challenge to a House Resolution providing for a prayer room in the Illinois State Capitol. In so holding, the court rejected as "much too crabbed" the district court's view that *Marsh* was "'a decision wedded to the unique historical circumstances' of that case—a one-time departure from the Court's consistent application of the *Lemon* criteria to establishment clause cases." *Id.* at 1219.

In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir.1987), the Court applied *Marsh* to determine the constitutionality of invocations and benedictions at high school graduation ceremonies. The court read *Marsh* as upholding practices such as invocations and benedictions that are religious in origin, but have become essentially secularized over the course of this country's history. Thus the court held that neutral or "civil" invocations and benedictions would be constitutionally

permissible at a high school graduation ceremony, *id.* at 1409, but found that the invocations and benedictions delivered in that case were not sufficiently neutral. *Id.* at 1410. Although I tend to concur in the analysis and conclusion of Judge Wellford's dissent, it is interesting to note the language of the court in *Stein*, which applied *Marsh* in spite of the fact that the challenged practice occurred in a school-sponsored event, and distinguished the school prayer cases in the following manner:

> [U]nlike classroom prayer, ceremonial invocations and benedictions present less opportunity for religious indoctrination or peer pressure. . . . Although children are obviously attending the ceremony, the public nature of the proceeding and the usual presence of parents act as a buffer against religious coercion. In addition, the graduation context does not implicate the special nature of the teacher-student relationship—a relationship that focuses on the transmission of knowledge and values by an authority figure. Therefore, the prayer in question here should be analyzed under the *Marsh* standards for ceremonial prayer notwithstanding the fact that a school function is involved.

Id. at 1409-10.

While it is not a "perfect fit," I believe that the case is more like *Marsh* than the school prayer cases such as *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) and *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). Accordingly, I would analyze the validity of the high school football game invocations under the principles enunciated in *Marsh*, rather than under those enunciated in *Lemon*.

In *Marsh,* the Supreme Court found that the Framers of the Constitution "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view,' " but rather viewed "invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.' " *Marsh,* 463 U.S. at 792, 103 S.Ct. at 3336 (citing *McGowan v. Maryland,* 366 U.S. 420, 442, 81 S.Ct. 1101, 1113-1114, 6 L.Ed.2d 393 (1961)). Noting also that there was no significant potential for indoctrination in the legislative setting, the Court concluded that the "practice of prayer similar to that now challenged. . . . presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Marsh,* 463 U.S. at 791, 103 S.Ct. at 3335-3336 (citations omitted).

The ceremonial invocations that open public high school games in Douglas County are facially constitutional under *Marsh.* These invocations add solemnity and dignity to a public event, preserve a long-standing and widespread tradition and remind participants and spectators of the importance of high ideals and values, such as sportsmanship and fair play at an athletic event. While the invocations at the football games may take the form of prayer, both the short duration of the invocations and the context in which they are delivered seem to alleviate any risk that the invocations will be used to proselytize or convert. Under the school's revised plan, where volunteer speakers are chosen at random from students, faculty and parents without regard to their religious or lack of religious beliefs and where there is no participation of or identification with min-

isters or their churches, the neutrality of the invocations can be presumed. The invocations here appear to be no more an endorsement of Protestant Christianity or of religion than the legislative prayer upheld in *Marsh*.

The indoctrination concerns raised in classroom prayer cases such as *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), are not implicated here. Football games in Douglas County are community events, and according to the district court's findings, the audience at the games consists of a large proportion of adults. Most students who attend the games are sixteen to eighteen years old and younger students are often accompanied by their parents. The invocations do not occur in a classroom or instructional setting, involving the student-teacher relationship, but instead take place after school hours. Football, band and related activities are extracurricular, and attendance at the football games is entirely voluntary. The invocations are given only five times a year, so there is no danger of daily indoctrination as there is when structured prayer is a part of a classroom setting. It is not improper to recognize that the attendees at these events reflect varying degrees of participation and non-participation in these exercises, and that complete disregard or lack of attention results in no adverse consequences to the individuals. I believe that the invocations attempt to provide a solemn opening to a public event without creating the potential for indoctrination, so under *Marsh*, the practice does not constitute the establishment of religion.

Even if this case is outside the scope of *Marsh*, working through the *Lemon* factors, in my judgment, leads to the same conclusion reached under the alternative analysis suggested by *Marsh*.

Under the first prong of the *Lemon* test, a challenged practice must have some legitimate secular purpose, but its purposes need not be exclusively secular. *Lynch v. Donnelly,* 465 U.S. 668, 680, 104 S.Ct. 1355, 1362-1363, 79 L.Ed.2d 604 (1984). Thus, in spite of the fact that the invocations delivered at football games in Douglas County are in essence short, public prayers, the practice may still be acceptable as long as the school's actual purpose in maintaining the tradition is not "to endorse or disapprove of religion." *Wallace v. Jaffree,* 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985).

In *Karen B. v. Treen,* 653 F.2d 897 (5th Cir. Unit A Aug. 1981), *aff'd mem.,* 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), the Court struck down a statute providing for prayer in the public schools. In finding that the statute had no secular purpose, the Court discussed the intrinsically religious nature of prayer. While that case might seem to stand for the principle that no practice inherently religious in character may pass muster under *Lemon's* first prong, a closer reading shows that the Court simply rejected the proffered secular purpose as a sham. *Id.* at 900-01. This interpretation of the case is consistent with Supreme Court decisional law. *Lynch,* 465 U.S. at 680, 104 S.Ct. at 1362 ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").

Invocations have been recognized to have secular purposes. These include "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Id.* at 693, 104 S.Ct. at 1369 (O'Connor, J. concurring). *See Stein v. Plainwell Community Schools,* 822 F.2d

1406, 1409 (6th Cir.1987) (invocation and benediction at high school graduation serve "solemnizing" function); *Bogen v. Doty,* 598 F.2d 1110, 1113 (8th Cir.1979) (invocations at County Commission meetings "directed toward establishing a solemn atmosphere and serious tone for the board meetings"); *Colo v. Treasurer and Receiver General,* 378 Mass. 550, 559, 392 N.E.2d 1195, 1200 (1979) (secular purposes of invocations at legislative sessions are "the maintenance of long tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform."); *Marsa v. Wernik,* 86 N.J. 232, 248, 430 A.2d 888, 896-97 (invocations at borough council meetings serve as a "call to conscience" and create "an atmosphere conducive to open exchanges, cooperative participation, and tolerant and conscientious deliberations of all those present. . . ."), *cert. denied,* 454 U.S. 958, 102 S.Ct. 495, 70 L.Ed.2d 373 (1981).

The district court found that the invocations at Douglas County High School football games serve the secular purposes of continuing a custom and tradition of longstanding, adding a tone of solemnity and dignity to the proceedings, and reminding the spectators and players of the importance of sportsmanship and fair play. These findings are not clearly erroneous and should not be disregarded by an appellate court. The existence of these legitimate secular purposes indicates that the school's actual purpose in continuing the invocations is *not* to endorse or disapprove of any religion. The first prong of the *Lemon* analysis is satisfied.

The inquiry next focuses on whether the practice of opening public high school football games with an

invocation has the primary effect of either advancing or inhibiting religion. Put another way, the "effect prong . . . asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Smith v. Board of School Comm'rs of Mobile County,* 827 F.2d 684, 690 (11th Cir.1987) (citing *Wallace v. Jaffree,* 472 U.S. 38, 56 n. 42, 105 S.Ct. 2479, 2489 n. 42, 86 L.Ed.2d 29 (1985)).

As I read the cases, this aspect of *Lemon* has become a question of degree. The Supreme Court has made it "abundantly clear . . . that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.'" *Lynch v. Donnelly,* 465 U.S. 668, 683, 104 S.Ct. 1355, 1364, 79 L.Ed.2d 604 (1984) (citing *Committee for Public Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 771, 93 S.Ct. 2955, 2964-2965, 37 L.Ed.2d 948 (1973)). Examples of practices cited as acceptable because of their insubstantial effect on religion include the printing of "In God We Trust" on coins, the reference to God in the Pledge of Allegiance, the exhibition of religious paintings in governmentally supported museums, tax exemptions for religious organizations and the use of the phrase "God save the United States and this honorable court" to open court sessions. *But cf. Hall v. Bradshaw,* 630 F.2d 1018, 1021 (4th Cir.1980) ("A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause . . . No *de minimis* exception is tolerable."), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1480, 67 L.Ed.2d 613 (1981).

Invocations at Douglas County High School games are given five times per season, are sixty to ninety

seconds in duration, and are not delivered by clergymen, but rather by volunteers who are chosen without regard to their religious beliefs or lack thereof. Given these facts, it cannot be said that such invocations advance religion in any significant way or convey a message of endorsement for a particular religious creed. *See Bogen v. Doty,* 598 F.2d 1110, 1114 (8th Cir.1979) ("[W]e suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion."); *Grossberg v. Deusebio,* 380 F.Supp. 285, 290 (E.D.Va.1974) ("[T]he Court is not convinced that the primary effect of the invocation will be either doctrinal dissemination or a manifestation of governmental affinity for religion. Such substance is rarely the result of high school graduation exercises.").

Lemon's last prong reviews the degree of governmental entanglement with religion engendered by the challenged practice. Under the school's revised plan for invocations, the school has no contact with churches or clergymen and school officials do not control or monitor the content of the invocations. The district court found that the cost to broadcast the invocations over the course of a season amounted to $1.08. These facts reveal no danger of excessive entanglement resulting from the pregame invocations.

The expenditure of $1.08 for the invocations raises another issue, however, that of the permissibility of the invocations under the Georgia Constitution. Article I, section 2, paragraph 7 of the Georgia Constitution provides: "*Separation of church and state*—No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." I would

hold that there is no violation of this provision here because, as noted above, I do not believe that the invocations do aid or advance any particular church, sect, cult or religious denomination. Moreover, plaintiffs' position that the clause is violated by even a *de minimis* expenditure is difficult to square with Georgia's practice of paying a salary to its legislative chaplain. *See Marsh*, 463 U.S. at 794 n. 18, 103 S.Ct. at 3337 n. 18 (noting that Georgia is among the states that provide compensation to its chaplains).

Mootness of Challenge to Traditional Invocation Practice

I would deem moot the Jagers' challenge to the invocations given before adoption of the equal access plan. The resolution of this issue turns on an analysis of *Hall v. Board of School Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B Sept. 1981) and *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir.1987). In the former case, this Court held that an Establishment Clause challenge to a school policy allowing students to conduct morning devotionals over the school's public address system was not moot, even though the school had discontinued the practice when the filing of the lawsuit was imminent. The Court noted that jurisdiction abates because of mootness when there is no reasonable expectation that the alleged violations will recur and when intervening events have completely and irrevocably eradicated the effects of the alleged violations. In finding that these criteria were not met, the Court focused on the fact that defendants asserted the constitutionality of the challenged activity up to the day of trial, even though the activity was clearly unconstitutional under *School Dist. of Abington Township v.*

Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), and was so recognized by the school superintendent. *Hall,* 656 F.2d at 1000.

In *Saladin,* the Court was faced with an Establishment Clause challenge to the design of a city seal, featuring a winged figure holding a banner inscribed with the words "Liberty" and "Christianity." The Court held that the challenge to the display of the seal on the city's water tank, vehicles and uniforms was moot because the city had agreed to remove the seal everywhere except on city stationery and documents. The Court based its decision on the fact that the city was no longer displaying the seal in the challenged locations, had promised not to display the seal in the future and there was no "basis for believing that the City will break its word." *Saladin,* 812 F.2d at 693.

I believe that *Saladin* controls this case. The key factor here is that the school system has not simply abandoned its earlier practice of using local ministers to deliver invocations, it has actually replaced this practice with a plan to select invocation speakers randomly from a pool which excludes clergymen. With this revised plan in place, adopted by consensus among school officials, there is no reasonable expectation that the activity initially challenged in this case will recur. While it is true that the school defended the traditional practice even though it had abandoned it, this fact is not dispositive because, unlike in *Hall,* the practice here was not clearly unconstitutional. Thus, the school's defense of its traditional practice does not clearly show either a desire to reinstate the practice or a dogmatic belief in its validity. The issue was moot as a matter of fact, even though both parties litigated the request for a

declaratory decree. The law is clear that a court may not render advisory opinions on moot issues even though requested to do so by both parties. *See, e.g., Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 7-8, 98 S.Ct. 1554, 1559-1560, 56 L.Ed.2d 30 (1978) (parties cannot "by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy.'"); *Kremens v. Bartley,* 431 U.S. 119, 136, 97 S.Ct. 1709, 1719, 52 L.Ed.2d 184 (1977) (issues deemed moot even though "all parties earnestly seek a decision on the merits.").

Attorney's Fees

The issue of mootness dovetails with the issue of plaintiffs' entitlement to attorney's fees as the prevailing party in this suit. Plaintiffs prevailed in this case only to the extent that the district court declared the school's traditional policy to be unconstitutional. Because I believe that this controversy was moot, I would not reach the issue of the constitutionality of the traditional practice under the standards discussed above. Thus, I would hold that it cannot be determined whether plaintiffs would remain the prevailing parties on appeal as far as their challenge to the traditional practice. Accordingly, I would reexamine plaintiffs' status as prevailing parties.

The caselaw of this Circuit allows a party to recover fees when remedial action by defendants effectively moots the controversy subsequent to the filing of the suit. *Iranian Students Ass'n v. Sawyer,* 639 F.2d 1160, 1163 (5th Cir. Unit A March 1981). In order to recover fees in the situation where there is no formal judicial relief, plaintiff must show that "their lawsuit

is a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior." *Robinson v. Kimbrough,* 652 F.2d 458, 466, 478 (5th Cir.1981). It is not enough, however, to show that defendants acted just because they had knowledge that litigation might occur.

On September 15, 1986, school officials announced the implementation of new procedures for pre-game invocations. Because plaintiffs' lawsuit was not filed until September 19, 1986, it is clear that the remedial action taken by the school was not precipitated by the plaintiffs' suit. While the change in procedures may well have been taken because of the concern about a lawsuit, this is not sufficient to entitle plaintiffs to attorney's fees. In fact, because of the firm position of plaintiffs in negotiations to accommodate their views, the school officials could have well expected suit in spite of their implementation of the new plan. I believe plaintiffs should not be considered prevailing parties in their challenge to the school's traditional plan for delivering invocations. I would vacate plaintiffs' fee award because, as the discussion above indicates, I believe that plaintiffs should not prevail in their challenge to the equal access plan.

Conclusion

The caselaw developed under the Establishment Clause has grown very complex, and there seems to exist a case for and against each proposition furthered by any party. There is a common thread, however, running through the majority of cases decided under both *Marsh* and *Lemon*: a common-sense balancing of the danger of Government establishment of religion with

the recognition that religious traditions are a part of our nation's fabric. While I have applied tests and analyzed cases to reach what I believe to be a principled result in this case, I have also attempted to approach the issues in this common-sense fashion. Both paths lead to the same conclusion: the opening of public high school football games with an invocation does not constitute Government establishment of religion.

APPENDIX II

(Filed February 3, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C86-2037A

DOUG JAGER and WILLIAM JAGER

v.

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION

ORDER

Plaintiffs brought this action under the Establishment and Free Exercise Clauses of the United States Constitution, and under Article I, Section 2, paragraph 7 of the Georgia Constitution to declare unconstitutional and to enjoin defendants' practice of having an invocation prior to Douglas County High School football games. Plaintiff Doug Jager is a senior at Douglas County High School and is a member of the Douglas County High School marching band; plaintiff William Jager is Doug Jager's father. Defendants are the Douglas County School District and the Douglas County Board of Education, who own and operate the football stadium in Douglas County where the challenged practice of having an invocation takes place.

Based on the limited record before it, the Court issued a temporary restraining order enjoining the defendant Douglas County Board of Education from conducting or

permitting to be conducted an invocation with any religious implication or significance prior to any athletic event at the school's stadium. A consolidated preliminary injunction hearing and trial on the merits was held on November 14-15, 1986, upon agreement of the parties pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.

The First Amendment to the Constitution of the United States provides, in relevant part, that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

U.S. Const. Amend. I. Although the express language of the Constitution only prohibits congressional establishment and restraint on free exercise of religion, *see Terrett v. Taylor,* 13 U.S. (9 Cranch) 43, 49 (1815), both the establishment and free exercise clauses have become fully applicable to the states. *Everson v. Bd. of Educ.,* 330 U.S. 1, 67 S. Ct. 504 (1947) (establishment clause); *Wallace v. Jaffree,* 105 S. Ct. 2479 (1985) (reaffirming the same); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900 (1940) (free exercise clause).

The Supreme Court set forth in *Lemon v. Kurtzman,* 403 U.S. 306, 91 S. Ct. 2105 (1971) a three-part test to be used when addressing establishment clause violations: the challenged statute or practice must have a secular purpose, its principal or primary effect must neither enhance nor inhibit religion and it must not foster an excessive governmental entanglement with religion. Failure under any one of the prongs of the *Lemon* test renders a challenged practice unconstitutional.

Recent cases construing the free exercise clause have adopted a balancing approach in determining the constitu-

tionality of a practice. A practice is constitutional if it "does not deny the free exercise of religious belief by its requirements, or [if] . . . there is a state interest of sufficient magnitude to override the interest claiming protection. . . ." *Wisconsin v. Yoder,* 406 U.S. 205, 214, 92 S. Ct. 1526, 1532 (1972).

Before proceeding to the findings of fact and conclusions of law in the case at bar, the court will set forth, in summary form, a brief review of Supreme Court and Eleventh Circuit case law dealing with the religion clauses of the First Amendment as they relate to issues of religion in public schools and prayer.

The history of the establishment clause in the Supreme Court is relatively short. The most recent era of school and prayer related establishment clause issues begins with *Illinois* ex rel. *McCollum v. Bd. of Educ.,* 333 U.S. 203, 68 S. Ct. 461 (1948) where the Court held invalid a system where religious instructors came into a public school at the behest of the administration to give lectures on Christianity. The program utilized a "time out" plan whereby students not desiring religious instruction remain in secular classes. Those students receiving religious instruction attended those classes separately, but in classrooms on school property. Four years later, the Supreme Court upheld a "time out" plan which provided that the religious instruction was to take place at other locations. *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679 (1952). The *Zorach* Court found that principles of accommodation permitted the teaching of religious doctrine off of school premises. *Id.* at 311. 72 S. Ct. at 686.

In 1962, the Court was first presented with the issue of prayer in school. In *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261 (1962), the Court struck down a nondenomi-

national prayer written by governmental authorities for recitation in classrooms prior to the commencement of classes. Next term, in *School Dist. of Abington Twnsp. v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560 (1963), the Court examined school sponsored programs of voluntary Bible readings and classroom prayer. The challenged activities were found to violate the establishment clause in that their primary effect was to advance religion in a public forum.

In *Epperson v. Arkansas,* 393 U.S. 97, 89 S. Ct. 266 (1968), the Court turned its attention to issues of modifications of school curricula for religious purposes. Arkansas had enacted a statute forbidding teachers in public schools to teach Darwin's theory of human evolution. The Court found that the law violated the establishment clause because it lacked a secular purpose.

In recent years, the Court has addressed various establishment clause issues raised by numerous cases. The first of these more recent treatments of the clause occurred in *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192 (1980). The *Stone* Court considered the question of whether a Kentucky statute which required the posting of a plaque of the ten commandments on the wall of each public school classroom in the state ran afoul of the establishment clause. The Court answered in the affirmative, finding that the practice was plainly religious in purpose as was amply evidenced by the legislative history of the statute. *Stone* is the first decision which applies the three-part *Lemon* test to school prayer cases. *Id.* at 40, 101 S. Ct. at 193.

Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983) involved the constitutionality of the practice of pre-session invocations in the Nebraska legislature. The

Court upheld the practice, finding that the practice of legislative invocations was so historically embedded in the national heritage that its religious components had become secularized. *Id.* at 789-90, 103 S. Ct. 3335. A year later, the Court was again faced with the problem of the impact of historical tradition on an otherwise religious practice. *Lynch v. Donnelly,* 104 S. Ct. 1355 (1984) posed the question of whether a nativity scene, when displayed amidst other entirely secular symbols of the Christmas season in a holiday pageant, violated first amendment strictures. The Court found that the display did not offend establishment principles. Again, the Court stressed the secular historical aspects of the creche in upholding its constitutionality.

In *Grand Rapids School Dist. v. Ball,* 105 S. Ct. 3216 (1985), the Court invalidated publicly funded shared time and community education programs which utilized public and non-public school instructors who taught classes in classrooms leased from and located in non-public schools. The shared time program involved full-time public school employees as teachers, many of whom had once been parochial school educators. The shared time classes were held during regular school hours and were offered as electives to the public school students. Much of the content of the class instruction was religious in nature. The community education program offered classes at the conclusion of the school day. The teachers in the community education program were part-time public school instructors, many of whom were also full-time non-public school teachers. The Court found that the plan made the public school "a regular adjunct of the religious school." *Id.* at 3227 (*quoting Felton v. United States Dept. of Ed.,* 739 F.2d 48, 67-68 (2d Cir. 1984)).

The same year as *Grand Rapids*, the Court decided *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). *Wallace* concerned two Alabama statutes which provided for moments of silence preceding classes for meditation or for voluntary prayer. Relying heavily on the legislative history of the statutes, a unanimous Court found both to be constitutionally infirm.

A review of Eleventh Circuit cases dealing with establishment clause issues as they affect public schools and prayer must start with former Fifth Circuit cases. In *Meltzer v. Bd. of Public Instruction of Orange City*, 577 F.2d 311 (5th Cir. 1978) (en banc), the former Fifth Circuit held that a school board's resolution requiring morning devotionals violated the establishment clause. Likewise, in *Hall v. Bd. of Comm'rs of Conecuh Cty.*, 656 F.2d 999 (5th Cir. [Unit B] 1981), the court of appeals declared unconstitutional a Bible literature course offered to public school students in Conecuh County, Alabama. One of the first cases decided by the Eleventh Circuit Court involved the erection and maintenance of a large cross on state-owned park property. The court found the display of the cross constitutionally suspect and affirmed the trial court's order to dismantle it. *ACLU v. Rabun Cty.*, 698 F.2d 1098 (11th Cir. 1983). In its most recent treatment of these issues, the Eleventh Circuit invalidated a school board's policy of allowing student religious groups to meet on school premises under faculty supervision and the practice of permitting churches to use school public address systems and bulletin boards for "secular" notices. *Nartowicz v. Clayton Cty. School Dist.*, 736 F.2d 646 (11th Cir. 1984).

In contrast with cases dealing with establishment clause issues, cases treating alleged infringements of rights

guaranteed under the free exercise clause of the First Amendment are few in number. In *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963), the Supreme Court found that state unemployment benefits could not be denied to a Seventh Day Adventist because she refused to work Saturdays. The Court found that the plaintiff had established that her belief in Saturday as the sabbath was religious and that the state had failed to present a "compelling" interest which could justify the denial of benefits. *Id.* at 407, 410, 83 S. Ct. at 1795, 1797. The court next heard and decided the case of *Wisconsin v. Yoder, supra.* There the Court found that the State of Wisconsin could not require Amish children to attend public school past the eighth grade. The Court stated that the law imposed a significant burden on the free exercise of religion, holding that the Amish "lifestyle" constituted a "religion" for First Amendment purposes. 406 U.S. at 215-16, 92 S. Ct. 1532-33. Further, the Court held that while education of adolescents between the ages of 14 and 16 was an important state concern, that interest did not outweigh the abridgement of plaintiff's free exercise rights. *Id.* at 229-30, 92 S. Ct. at 1540.

In its most recent treatment of the free exercise clause, *Thomas v. Review Bd. of the Indiana Employment Security Div.*, 450 U.S. 707, 101 S. Ct. 1425 (1981), the Court upheld a challenge to an unemployment board's denial of benefits upon plaintiff's discharge from employment. Plaintiff, a Jehovah's Witness, had refused transfer to a factory division which produced war materials as against his religious tenets. The court found that Thomas' beliefs were religious in nature and that the state's interest in not promoting unemployment was not furthered by the challenged policy. *Id.* at 719, 101 S. Ct. at 1432.

The Eleventh Circuit (and the former Fifth Circuit) has had occasion to address free exercise issues at length in three cases. In *Shabazz v. Barnauskas*, 598 F.2d 345 (5th Cir. 1979), the former Fifth Circuit vacated a district court order which denied petitioner's free exercise claim that prison officials could not constitutionally require him to shave his beard without a hearing. The court of appeals remanded the case for hearing on whether the petitioner could establish an article of religious faith which would prohibit shaving. The court noted that other circuits had recognized that the maintenance of a beard, while to most an aspect of personal appearance, can constitute a religious belief which is constitutionally protected. In 1982, the court of appeals decided *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982) which involved a challenge to the classification of marijuana by Congress as a Schedule I controlled substance. Petitioner alleged that his conviction on drug trafficking and possession charges was tainted by a denial of the free exercise of his religion – Ethiopian Zion Copticism. The court rejected these arguments, finding that the governmental interest in controlling contraband substances outweighed infringements of petitioner's religious freedoms. *Id.* at 825.

In its latest free exercise case, *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), the Eleventh Circuit upheld a municipal zoning ordinance which prohibited plaintiffs from using their residence for organized religious services against a free exercise attack. The court found that the City's interest in enforcing its zoning laws to preserve the residential character of certain municipal areas outweighed what was seen as a minimal and somewhat conjectural burden on the religious liberties of plaintiffs. *Id.* at 738-39.

It is within the framework of these decisions that the present case must be resolved.

The court now turns to its findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Doug Jager is an eighteen (18) year old student at Douglas County High School, a resident of Douglas County, Georgia, a citizen of the United States and a taxpayer.

2. Plaintiff William Jager, Doug Jager's father, is a resident of Douglas County, Georgia, a citizen of the United States and a taxpayer. William Jager also has a fourteen (14) year old child currently enrolled in the Douglas County public school system.

3. Defendant Douglas County School District ("DC SD") is a body corporate and an agency and political subdivision of the State of Georgia, County of Douglas with the capacity to sue and be sued. DCSD is under the control and management of the Douglas County Board of Education ("Board"), pursuant to statutory law and is subject to the jurisdiction of this court.

4. Defendant Douglasville-Douglas County Stadium Authority was voluntarily dismissed as a defendant in this action.

5. Doug and William Jager are descended from Native Americans. The Jagers possess and exhibit sincere religious convictions derived from: (a) the reverence of Native Americans for nature; (b) a fundamental belief in the intellectual capacity of human beings to identify and address the salient issues of human existence; and (c) a skepticism toward organized religious

dogma that inhibits intellectual curiosity and scientific inquiry into questions and problems of human existence. The elder Jager is genuinely and legitimately concerned for raising his children, both Doug and his 14-year old sibling, in accordance with William Jager's religious values and beliefs.

6. The majority religious preference in Douglas County, Georgia, is Protestant Christian.

7. High School football games in Douglas County are a school-sponsored activity. Games are played on school property at stadiums owned and operated by the Douglas County school system. The students who play football and the students who participate in the half-time marching band performance are supervised by salaried employees of the school system. Booster clubs and gate revenues cover the vast majority of ordinary operating expenses for the football program. Some small amount of taxpayer funds are used to pay for certain operating expenses, primarily for electrical service for stadium lights and for the public address system.

8. A portable public address system was first used at Douglas County High School ("DCHS") football games in 1947. A permanent public address system has been used since 1962. The system is presently operated from the stadium press box and the principal of DCHS is ultimately responsible for announcements made over the microphone. The Board has no policy of formal guidance for principals which regulates use of the stadium public address system. Regulation of what is said over the system is left to individual principals' discretion.

9. Pre-game invocations have been given at DCHS football games since at least 1947, when the public address system was first acquired.

10. Invocations are given at away games, as well as at home games.

11. Invocations are given at virtually all high school football games in Georgia.

12. Invocations are a part of the pre-game ceremonies opening each home football game. First, an announcer introduces the invocation speaker and usually identifies the name of the church with which he is affiliated. After the speaker is introduced, the invocation is then given and is followed by the national anthem.

13. The invocations at DCHS football games have consisted of a prayer, addressed to God which asks for God's blessing. The prayers often opened with the words "let us bow our heads" or "let us pray" and frequently invoked reference to Jesus Christ or closed with the words "in Jesus' name we pray".

14. The invocation speakers usually address themes of good sportmanship, safety and fair play.

15. The invocations last approximately sixty (60) to ninety (90) seconds and are given five (5) times per year at DCHS home football games.

16. No minister or lay person has ever been denied the opportunity to deliver a pre-game invocation.

17. The Board has no official policy governing invocations.

18. No one, other than plaintiffs, has ever complained to DCHS, the Board or DCSD about the practice of pre-game prayer.

19. Doug Jager began studying instrumental music in 1980. He plans to continue his participation in march-

ing band in college where he also plans to minor in music. When Doug Jager entered DCHS in 1983, the school required band students to perform at football games as part of their academic course-work. In 1985, the school changed this policy and made marching band (as distinguished from concert band) an extra-curricular element of the school's musical education program. However, as a music student and band member, Doug Jager continues to attend and perform at football games. No student is compelled to attend the games.

20. William Jager regularly attends the football games where his children perform in the band.

21. A large proportion of the audience at DCHS football games is comprised of adults. Most students who attend are sixteen (16) to eighteen (18) years old. The younger students in attendance are generally accompanied by a parent.

22. At first, invocation speakers were invited by student government. Commencing in 1950, local ministers began to give the invocations. Then, in the early 1970s, DCHS assistant coach Ike Willoughby delegated the task of furnishing invocation speakers to Reverend Leon Jeffords, a Presbyterian clergyman.

23. From the early 1970s through 1986, Jeffords discharged this task by recruiting invocation speakers through the Douglas County Ministerial Association ("DCMA"). The DCMA is a group of ordained clergy whose membership currently consists exclusively of Protestant Christian ministers.

24. Recently, Jeffords has received two (2) complimentary season tickets to DCHS football games. The tickets are for the use of the speaker who gives the in-

vocation. The free tickets are not paid for by taxpayer revenues, but rather by monies in the Athletic Fund.

25. With perhaps five (5) exceptions, every invocation delivered at DCHS football games from the years 1974-1986 was given by a Protestant Christian clergyman.

26. Beginning in the Fall of 1985, Doug Jager attempted to obtain relief from the Douglas County school system on his objections to the pre-game prayers. He began by writing to his school principal, John Stone. Stone responded by asking Tony Plunkett, the band director, to discuss the matter with the younger Jager. Plunkett, who was at the time routinely leading the marching band in recitations of the Lord's Prayer prior to every performance, proceeded to lecture plaintiff on Christianity.

27. In March 1986, counsel for the plaintiffs contacted counsel for the school system to seek a solution to the instant dispute. This resulted in a June 2, 1986 conference between school Superintendent Kathryn M. Shehane, counsel for the school system, the Jagers and their counsel. Shehane and her counsel, without notice to the Jagers or their counsel, invited members of the DCMA to participate in the meeting. At the meeting, two alternative proposals for modifying the invocation practices were discussed: an inspirational wholly secular speech and an "equal access" plan which retained some religious content.

28. On July 3, 1986, plaintiffs rejected the "equal access" approach and notified counsel for the school system that the inspirational speech was the only feasible alternative to the invocation practice.

29. Upon plaintiffs' rejection of the "equal access" plan, Reverends Jamie E. Jenkins and Donald Mountain, both of the DCMA, met with counsel for the school system and proceeded to draft a compromise proposal. The stated purpose of the draft was to "perpetuate and regulate the traditional invocation as part of the opening ceremonies of school athletic events."

30. On August 28, 1986, plaintiffs and their counsel again met to discuss compromise with counsel for the school system and Shehane. Again, Jenkins and Mountain were in attendance. At the meeting, Jenkins and Mountain presented their form of the "equal access" plan as a possible solution. Although the proposal was substantially similar to the one already rejected by the plaintiffs on July 3, plaintiffs agreed to reconsider the plan in return for the voluntary cessation of prayer at DCHS football games in the interim.

31. In September of 1986, Superintendent Shehane met with the principals of Douglas County high schools to discuss the issue of pre-game prayers. The document drafted by Jenkins and Mountain was considered and the principals and Shehane decided to proceed in accordance with the equal access plan.

32. The policy statement written by Jenkins and Mountain has never been adopted, and has never been considered for adoption, by the Board as an official policy.

33. On September 15, 1986, the principals of Douglas County high schools informed their schools that invocations would proceed at the football games scheduled for September 26 and at all future games in accordance with the "equal access" plan. The terms of the plan, as announced, are coextensive with the terms as set forth in the Jenkins/Mountain plan.

34. Superintendent Shehane states that if the school were permitted to continue invocations at the football games, she would encourage the school principals to adhere to the "equal access" plan.

35. Under the terms of the proposed "equal access" plan, all clubs and organizations at the school can designate members of their clubs to give invocations. Also, any student, parent or school staff member can submit his or her name. The student government will then select the invocation speaker at random. No ministers will be involved as invocation speakers nor will they be involved in selecting such speakers. The school will not attempt to control or otherwise monitor the content of the invocations. The invocation speakers will be selected without regard to their religion or lack of religious beliefs.

36. Representatives of the defendants never identified any secular purpose for the invocation until this lawsuit arose.

37. While the School Board has adopted policies on issues important to the school, *i.e.*, graduation requirements, teaching of religion, interscholastic athletics, extracurricular activities, the School Board has never adopted any policy on the giving of invocations at football games.

38. The School System authorizes pep rallies and cheerleaders to build school spirit and fan support for school athletic teams. No invocations are given at basketball games, baseball games, or other events in which Douglas County sports teams participate and to which fans are invited. Despite the fact that no invocations were given at Douglas County football games during the 1986 football season, the School System experienced no measurable increase in fan violence, rowdiness or unsportsmanlike behavior.

39. Pre-game invocations at DCHS football games serve several purposes: to continue a custom and tradition of long-standing, to add a tone of solemnity and dignity to the proceedings and to remind the spectators and players of the importance of sportsmanship and fair play. However, the invocations also endorsed Protestant Christian doctrine. One of the defendants' purposes in having and supporting an invocation prior to high school football games in Douglas County was motivated by a desire to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity.

40. One of the effects of the prior practices in regard to invocations was to create the appearance or impression that the school system endorsed Protestant Christianity.

41. The conduct and the actions of the defendants had no adverse impact on the plaintiffs' exercise of their religious beliefs.

42. Whatever expenditures were made by the defendants that can be attributable to the activities objected to by the plaintiffs were *de minimis*.

43. The plaintiffs would achieve most of the objectives they are seeking by the implementation of the "equal access" plan.

CONCLUSIONS OF LAW

A. *Establishment Clause*

The court finds that the challenged custom and practice of invocations before DCHS football games violates the Establishment Clause of the First Amendment.

As pointed out *supra,* failure under any one prong of the three-part *Lemon* test renders a practice constitutionally invalid. As the court finds that the pre-game prayers fail the secular purpose prong of the *Lemon* test, it does not address the validity of the practice under the second or third part of the test.

The religious nature of the invocations are apparent. *Engel v. Vitale,* 370 U.S. 421, 425, 82 S. Ct. 1261, 1264 (1962). The Eleventh Circuit has held that:

> This circuit has stated that "prayer is perhaps the quintessential religious practice . . . since prayer is a primary religious activity in itself, its observance in public school classrooms [implies a religious purpose]." *Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied.*

Jaffree v. Wallace, 705 F.2d 1526, 1534-35 (11th Cir. 1983) (footnote omitted) (emphasis added).

Based upon the applicable precedents and the facts of this case, the court holds that the invocations at issue here cannot qualify as having a clear secular purpose, *Wallace v. Jaffree,* 105 S. Ct. 2479, 2483 n.22 (1985); *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 773, 93 S. Ct. 2955, 2965 (1973); *see also Hall v. Bd. of School Comm'rs of Conecuh Cty.,* 656 F.2d 999, 1002 (5th Cir. [Unit B] 1981).

B. *Free Exercise Clause*

The court finds that the pre-game invocations do not infringe plaintiffs' First Amendment rights under the Free Exercise Clause. Plaintiffs have failed to demonstrate that the pre-game prayer infringes on the exer-

cise of their religious beliefs. *See Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S. Ct. 1526, 1532 (1972).

C. *Georgia Constitutional Claim*

The court holds that plaintiffs have not established a violation of Article I, Section 2, paragraph 7 of the Georgia Constitution.

RELIEF SOUGHT

Accordingly, the court grants plaintiffs' request for a judgment declaring the pre-game invocations at Douglas County High School football games unconstitutional. The court, however, denies the plaintiffs' request for a permanent injunction, as the court believes that no additional restraint is necessary to assure the defendants' compliance with the provisions of this Order. If the need should arise for further relief that issue will be addressed at an appropriate future time.

At the present time should any further orders be necessary in order to implement the provisions of this order, counsel are directed to notify the court and opposing counsel by appropriate motion.

SO ORDERED, this 3 day of February, 1987.

/s/ .....

G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX III

(Filed February 27, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C86-2037A

DOUG JAGER and WILLIAM JAGER

v.

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION

ORDER

The defendants' motion for clarification, and the plaintiffs' response in opposition to motion for clarification, having been considered by the Court, and after hearing argument of counsel, the Court enters the following Order:

1. *Additional Conclusions of Law.* The Court finds that the "equal access" plan, as described in the Court's order of February 3, 1987, and particularly in Paragraph 35 thereof, is constitutional on its face and does not violate the Establishment Clause of the First Amendment.

The Court declines at this time to express any opinion as to the application of the "equal access" plan.

2. *Relief sought.* The Court denies plaintiffs' request for a judgment declaring the "equal access" plan to be unconstitutional on its face. The Court denies the plain-

tiffs' request for a permanent injunction as to the "equal access" plan.

3. In all other respects the Order of February 3, 1987 remains unchanged. The Court directs that the Clerk promptly enter a final judgment in this case.

SO ORDERED, this 27 day of February, 1987.

/s/ .....

G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX IV

(Filed June 2, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C86-2037A

DOUG JAGER and WILLIAM JAGER

v.

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION

ORDER

The above-styled matter is before the court on four motions: (1) plaintiffs' motion for attorney's fees; (2) plaintiffs' objections to defendants' bill of costs; (3) defendants' objections to plaintiffs' bill of costs and (4) plaintiffs' motion to amend and for reconsideration. Because the court finds plaintiffs to be the prevailing party in this litigation, the court will not address motion (2) above.

ATTORNEYS' FEES

Plaintiffs move under 42 U.S.C. § 1988 for an award of attorneys' fees. Defendants contest the motion on the ground that plaintiffs are not the "prevailing party" within the meaning of section 1988.

The Eleventh Circuit adopts the "central issue" test for determining which party to a lawsuit is a prevailing

party for purposes of awarding attorneys' fees. *See Taylor v. City of Ft. Lauderdale,* 810 F.2d 1551 (11th Cir. 1987); *Best v. Boswell,* 696 F.2d 1282, 1289 (11th Cir.), *cert. denied,* 464 U.S. 828, 104 S. Ct. 103 (1983). In elaborating on the controlling test, the court of appeals has held that a prevailing party is one who "receiv[es] substantially the relief requested or has been successful on the central issue." *Martin v. Heckler,* 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc).

Defendants urge that the issue of the constitutionality of the pre-"equal access" practices was a moot issue which deprived the court of subject matter jurisdiction over that issue and which precludes finding that issue to be the central issue litigated. This claim of mootness is grounded in a contention that the traditional practice of pre-game prayers was voluntarily ceased prior to the institution of this suit. The central issue in this matter was the constitutionality of the practice of giving pre-game invocations at high school football games in Douglas County, Georgia, and not, as defendants contend, the facial constitutionality of the "equal access" plan.

A case can only be mooted by voluntary cessation where it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Ass'n,* 393 U.S. 199, 203, 89 S. Ct. 361, 364 (1968). Ordinarily, however, voluntary cessation will not moot an action because the "defendant is free to return to his old ways. . . ." *United States v. W.T. Grant Co.,* 345 U.S. 629, 632, 73 S. Ct. 894, 896 (1953); *accord* L. Tribe, American Constitutional Law § 3-14, at 67 (1978 & Supp. 1979). Therefore, the issue of the constitutionality of the pre-"equal access" plan practice of pre-game prayer is not moot. In fact, the prac-

tice was temporarily enjoined by this court prior to adjudication on the merits. At no point during the hearing on the motion by plaintiffs for a temporary restraining order or during the trial on the merits was the mootness argument raised. Both plaintiffs and defendants have steadfastly litigated the allegedly moot issue.

Defendants next argue that plaintiffs are not prevailing parties because they did not receive the primary relief sought - an injunction. *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979). Plaintiffs sued for both injunctive and declaratory relief. Although the court declined to issue a permanent injunction against the defendants, plaintiffs prevailed in the form of a declaratory judgment. It is clear that a declaratory judgment qualifies as "primary relief" under section 1988. *See Solomon v. City of Gainesville*, 796 F.2d 1464, 1466 (11th Cir. 1986).

Accordingly, the court finds plaintiffs to be the prevailing party for purposes of awarding attorneys' fees. Defendants have requested, in the event that the court so found, that they be granted leave to file opposition to plaintiffs' itemization and bill for such fees. The court grants this request. Defendant shall file such opposition, and cause the same to be served on plaintiffs, within thirty (30) days from the date of this Order. Plaintiffs may file a response to the defendants' opposition within ten (10) days of the receipt of such opposition.

COSTS

Plaintiffs also move for costs pursuant to Fed. R. Civ. P. 54(d). Defendants contest awarding costs on the ground that plaintiffs are not the prevailing party in the litigation. Defendants' theory is identical to its position on attorneys' fees, discussed *supra*. The court finds that

plaintiffs are the prevailing party under Rule 54(d) for purposes of assessing costs.

The only objection to specific items sought to be charged as costs concerns claimed copying fees in the amount of $207.80. Plaintiffs state that these costs were incurred in copying documents, exhibits and research necessary for use at trial. Defendants contend that the subject materials were copied for use in plaintiffs' trial notebook and are, therefore, noncompensable extra copies. Exhibit D to plaintiffs' Itemization of Bill of Costs shows that 1039 pages of copies, at $0.20 per page, were utilized for a trial notebook (a total cost of $207.80). Defendant is correct in maintaining that such charges are not recoverable under 29 U.S.C. § 1920. *See Fressell v. AT & T Technologies, Inc.*, 103 F.R.D. 111, 114 (N.D. Ga. 1984). Accordingly, $207.80 of plaintiffs' copying costs are disallowed.

Plaintiff is awarded, and defendants assessed, costs as follows:

(1)	Filing Fees	$ 60.00
(2)	Service Fees	13.00
(3)	Court Reporter	1,063.75
(4)	Witness Costs	373.39
(5)	Copying	170.60
(6)	Depositions	1,784.14
(7)	Miscellaneous	85.00
	TOTAL	$3,549.88

Accordingly, plaintiffs are awarded Three Thousand Five Hundred Forty-Nine and 88/100 Dollars ($3,549.88) in costs.

MOTION TO AMEND AND FOR RECONSIDERATION

Plaintiffs move the court to amend or reconsider its Order of February 27, 1987. Plaintiffs also request the court to amend the judgment entered March 6, 1987.

Said motion is denied.

SO ORDERED, this 2 day of June, 1987.

/s/ .....

G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX V

(Filed August 31, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C86-2037A

DOUG JAGER and WILLIAM JAGER

v.

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION

ORDER

The above-styled matter is presently before the court on plaintiffs' request for attorney's fees. The court has previously ruled that plaintiffs were the prevailing parties in this litigation within the meaning of 42 U.S.C. § 1988. Defendants contest the fees as to both the lodestar amount sought by plaintiffs and any enhancement of that lodestar amount.

Defendants do not contest the reasonableness of the rate charged by each of plaintiffs' attorneys; however, defendants do challenge the number of hours billed. This challenge proceeds under three theories which the court will address *seriatim*. Prior to doing so, however, the court sets forth plaintiffs' proposed lodestar amount:

Attorney	Hours		Rate	Total
Bramlett	339.9	x	$120/hr.	$40,788.00
Gorwitz	239.4		80/hr.	19,152.00
Goldberg	79.65		145/hr.	11,549.25
Horst	4.9		90/hr.	441.00
	SUBTOTAL (Attorneys)			$71,930.25

Paralegal	Hours	Rate	Total
Summer Associate; Senior Paralegal	63.6	$50/hr.	$ 5,795.00
Paralegal I	10.7	45/hr.	481.50
Paralegal II	41.7	35/hr.	1,459.50
	SUBTOTAL (Paralegal)		$ 7,736.00
	SUBTOTAL (Legal Fees)		$79,666.25
	(less items plaintiff admits are properly objected to by defendants)		(46.00)
			$79,620.25
	EXPENSES		$ 6,312.30
	(less items taxed as costs)		(3,757.68)
	SUBTOTAL EXPENSES		$ 2,554.62
	GRAND TOTAL		$82,174.87

A. *Time Spent in Settlement Efforts*

Defendants contend that attorney's fees involving pre-complaint efforts to settle this matter are non-compensable under section 1988. Such fees total $1,284.00.

Defendants cite *Webb v. Dyer Cty. Bd. of Educ.*, 471 U.S. 234, 105 S. Ct. 1923 (1986) in support of this contention.

Webb is inapposite to the issue of pre-complaint settlement compensation under section 1988. *Webb* involved time spent by counsel on an optional administrative proceeding over a four-year period and concluding almost eleven months prior to filing the complaint. In holding that such services were not compensable under the Civil Rights Acts, the Court focused on whether the work product involved in the administrative action was "both useful and of a type ordinarily necessary to advance the civil rights litigation." *Id.* at 243, 105 S. Ct. at 1928. The Court did not extend that holding to attempts to settle a case.

In *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181 (11th Cir. 1983), the Eleventh Circuit affirmed an award of attorney's fees under section 1988 to the NAACP for a pre-complaint site inspection. *Id.* at 1188. The Eleventh Circuit has never ruled on the precise question of whether time spent toward settlement of a civil rights matter is compensable under section 1988, but the court is persuaded that such an award is permissible.

Accordingly, the court declines to reduce the lodestar amount to exclude time spent on settlement efforts.

B. *Non-Attorney Work*

Defendant seeks to exclude all charges for paralegal work, regardless of the fee charged for such work or the hours spent by the paralegal.

Defendants give no reason for such an exclusion. Such fees are regularly awarded so long as the services

were reasonably necessary to the litigation and the fees charged are reasonable. *See Ramos v. Lamm,* 713 F.2d 546, 558-59 (10th Cir. 1983).

Accordingly, the court declines to exclude awards for paralegal services.

C. *Unsuccessful Claims*

Defendants contend next that the lodestar amount should be reduced by time spent on unsuccessful claims. Defendants contend that plaintiffs were unsuccessful as to claims for the facial unconstitutionality of the "equal access" plan, the free exercise claim and the Georgia constitutional law claim.

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983) holds that unsuccessful claims which are separate and distinct "in all respects" from successful claims cannot form the basis for compensation under section 1988. *Id.* at 440, 103 S. Ct. at 1943. More recently, the Court held that claims arising from a "common core of facts" cannot be divided to preclude an award of attorney's fees. *City of Riverside v. Rivera,* 106 S. Ct. 2689 (1986).

The court finds that the free exercise claim and the Georgia constitutional law claim are so interrelated with the successful establishment clause claim involving the traditional practice of pregame invocations that *Hensley* and its progeny do not require a divided fee. The question is closer with regard to the issue of the facial constitutionality of the "equal access" plan, and the court finds that it should be separated from the successful claims.

The plaintiffs' contentions involving the validity of the "equal access" plan were a substantial part of plaintiffs' entire claim, equalling twenty-five percent (25%)

or more of those claims. It would be unfair and grossly inequitable to require defendants to pay for the substantial amount of work performed on this unsuccessful claim.

Therefore, the court reduces the lodestar amount of claimed attorney's fees by a factor of twenty-five percent (25%). This reduction yields a lodestar amount for attorney's fees of $53,947.69 ($71,930.25 - 17,982.56).

Accordingly, allowable attorney's fees plus paralegal fees plus expenses amount to $64,192.31.

ENHANCEMENT

Plaintiff seeks enhancement based on five of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir. 1974). Defendants contest any enhancement.

A. *Preclusion of Other Employment*

Although defendants in general state that they oppose enhancement under any *Johnson* criterion, defendants voice no specific objection to enhancement because of preclusion of other employment.

Attorneys Bramlett and Gorwitz have both submitted affidavits which demonstrate that they spent a combined time of 560 hours on this matter which could have been billed by the firm of Bondurant, Mixson & Elmore to non-*pro bono* clients.

The main purpose of enhancement based on preclusion of other employment "involves the dual consideration of otherwise available business which is foreclosed because of *conflict of interest* which occur from the representation and the fact that once the employment is undertaken, the attorney is *not free to use the time on the client's behalf*

for other purposes." Johnson, 488 F.2d at 718 (emphasis added).

There is no showing of conflict of interest here and counsel's firm could have, and would have, covered other business with other attorneys, given the size and scope of this particular law firm. Therefore, no business would be lost due to counsel's representation of the Jagers.

Accordingly, the court declines enhancement on the ground of preclusion of employment.

B. *Time Constraints and Limitations*

Plaintiffs contend that the lodestar figure should be enhanced because the litigation was under severe time constraints. After lengthy settlement attempts which did not cease until the time immediately prior to suit, defendants did not notify plaintiffs until shortly before the first Douglas County High School football game that the traditional practice of pre-game invocations would continue. Plaintiffs immediately moved for a temporary restraining order, a hearing was had on the motion and the motion was granted. Thereupon, expedited discovery was commenced and a trial on the merits was consolidated with the preliminary injunction hearing. However, the time constraints involved in this proceeding were not significantly more severe than those involved in most substantial litigation.

However, the court concludes that the time constraints would support some degree of enhancement.

C. *Superior Results Obtained*

Plaintiffs also contend that the lodestar fee should be enhanced because plaintiffs' counsel achieved superior results in this case.

While plaintiffs are the prevailing parties under section 1988, plaintiffs did not succeed on all of their claims, nor did they secure an injunction. Further, the court found, contrary to plaintiffs' allegations, that the "equal access" plan was facially valid under the Constitution.

Accordingly, the court finds that enhancement is not supported on this ground.

D. *Undesirability of the Case*

Plaintiffs next contend that the fee should be enhanced because the case was undesirable. The court is aware of the fact that, in this geographic locale, and in Douglas County, Georgia, in particular, there was a substantial amount of sentiment contrary to plaintiffs' position in the case justifying some enhancement.

E. *Contingency Fee*

Plaintiffs further seek enhancement because there was a contingency fee arrangement in this case. Defendants object to this enhancement on two grounds.

Plaintiffs have not set forth any of the details of their fee agreement or any of the details of the contingency. The plaintiffs have therefore failed to make a sufficient showing to support an enhancement based upon a contingency factor.

AWARD OF ATTORNEY'S FEE AND EXPENSES

Plaintiffs have not requested any specific enhancement percentage. Considering all factors supporting enhancement in this matter, the court concludes that the lodestar amount is enhanced by five percent (5%) of the amount of claimed attorney's fees only.

Accordingly, the following is the award of attorney's fees and expenses:

Allowable Attorney's Fees	Enhancement Factor	Enhancement Amount
$53,947.69	5%	$2,697.00

Therefore, the total amount awarded plaintiffs is:

$53,947.69	
2,697.00	
7,690.00	
2,554.62	
$66,889.31	TOTAL AWARD

SO ORDERED, this 31 day of August, 1987.

/s/ .....

G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX VI

(Filed March 3, 1989)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8522
87-8719

DOUG JAGER and WILLIAM JAGER,
Plaintiffs-Appellants,
Cross-Appellees,

versus

DOUGLAS COUNTY SCHOOL DISTRICT, et al.,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion January 3, 11 Cir., 1989, ... F.2d .....).

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and PECK*, Senior Circuit Judge.

PER CURIAM:

( ) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active

---

*Hon. John W. Peck, Senior U. S. Circuit Judge, sitting by designation.

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

(√) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ .....
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1610

In The

Supreme Court of the United States

October Term, 1988

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION,

Petitioners,

vs.

DOUG JAGER and WILLIAM JAGER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *this* public school system's practice of broadcasting prayers at high school football games violate the Establishment Clause?

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No. 88-1610

In The

Supreme Court of the United States

October Term, 1988

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION,

Petitioners,

vs.

DOUG JAGER and WILLIAM JAGER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Doug and William Jager respectfully oppose the Petition for Writ of Certiorari filed by the Douglas County School District and Douglas County Board of Education ("the School System").

STATEMENT OF THE CASE

I. Statement of Facts

The facts of this case are accurately stated in the Court of Appeals' decision.[1] Of particular pertinence are the following findings of fact made by the trial court:[2]

> Doug and William Jager are descended from Native Americans. The Jagers possess and exhibit sincere religious convictions derived from: (a) the reverence of Native Americans for nature; (b) a fundamental belief in the intellectual capacity of human beings to identify and address the salient issues of human existence; and (c) a skepticism toward organized religious dogma that inhibits intellectual curiosity and scientific inquiry into questions and problems of human existence. The elder Jager is genuinely and legitimately concerned for raising his children, both Doug and his 14-year old sibling, in accordance with William Jager's religious values and beliefs.[3]
>
> The majority religious preference in Douglas County, Georgia is Protestant Christian.[4]
>
> High School football games in Douglas County are a school-sponsored activity. Games are played on school property at stadiums owned and operated by

---

[1] This decision is reprinted in the petition for certiorari as Appendix I. The panel majority's statement of the facts is reprinted at A5 - A7.

[2] The trial court's order of February 3, 1987, reprinted in the petition as Appendix II, contains the trial court's findings of fact. For convenience, further reference to these findings will be cited to the page where they appear in the appendix to the cert petition.

[3] A50-A51, Finding #5.

[4] A51, Finding #6.

the Douglas County school system. The students who play football and the students who participate in the half-time marching band performance are supervised by salaried employees of the school system. * * * * [T]axpayer funds are used to pay for certain operating expenses, primarily electrical service for stadium lights and for the public address system.[5]

Invocations are a part of the pre-game ceremonies opening each home football game. First, an announcer introduces the invocation speaker and usually identifies the name of the church with which he is affiliated.[6]

The invocations at DCHS (Douglas County High School) have consisted of a prayer, addressed to God which asks for God's blessing. The prayers often opened with the words "let us bow our heads" or "let us pray" and frequently invoked reference to Jesus Christ or closed with the words "in Jesus' name we pray."[7]

Commencing in 1950, local ministers began to give the invocations.[8] From the early 1970's through 1986, [invocation speakers were recruited] through the Douglas County Ministerial Association ("DCMA"). The DCMA is a group of ordained clergy whose membership currently consists exclusively of Protestant Christian ministers.[9] With perhaps five (5) exceptions, every invocation delivered at DCHS football games from the years 1974-1986 was given by a Protestant Christian clergyman.[10]

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[5] A51, Finding #7.

[6] A52, Finding #12.

[7] A52, Finding #13.

[8] A53, Finding #22.

[9] A53, Finding #23.

[10] A54, Finding #25.

Beginning in the Fall of 1985, Doug Jager attempted to obtain relief from the Douglas County school system on his objections to the pre-game prayers. He began by writing to his school principal, John Stone. Stone responded by asking Tony Plunkett, the band director, to discuss the matter with the younger Jager. Plunkett, who was at the time routinely leading the marching band in recitations of the Lord's Prayer prior to every performance, proceeded to lecture plaintiff on Christianity.[11]

In March 1986, counsel for the plaintiffs contacted counsel for the school system to seek a solution to the instant dispute. This resulted in a June 2, 1986 conference between school Superintendent Kathryn M. Shehane, counsel for the school system, and the Jagers and their counsel. Shehane and her counsel, without notice to the Jagers or their counsel, invited members of the DCMA to participate in the meeting. At the meeting, two alternative proposals for modifying the invocation practices were discussed: an inspirational wholly secular speech and an "equal access" plan which retained some religious content.[12]

Upon plaintiffs' rejection of the "equal access" plan, Reverends Jamie E. Jenkins and Donald Mountain, both of the DCMA, met with counsel for the school system and proceeded to draft a compromise proposal. The stated purpose of the draft was to "perpetuate and regulate the traditional invocation as part of the opening ceremonies of school athletic events."[13]

In September of 1986, Superintendent Shehane met with the principals of Douglas County high schools to discuss the issue of pre-game prayers. The document drafted by Jenkins and Mountain was consid-

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[11] A54, Finding #26.

[12] A54, Finding #27.

[13] A55, Finding #29.

ered and the principals and Shehane decided to proceed in accordance with the equal access plan.[14]

On September 15, 1986, the principals of the Douglas County high schools informed their schools that the invocations would proceed at the football games . . . in accordance with the "equal access" plan. The terms of the plan, as announced, are coextensive with the terms set forth in the Jenkins/Mountain plan.[15]

Representatives of [the school system] never identified any secular purpose for the invocation until this lawsuit arose.[16]

One of the defendants' purposes in having and supporting an invocation prior to high school football games in Douglas County was motivated by a desire to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity.[17]

One of the effects of the prior practices in regard to invocations was to create the appearance or impression that the school system endorsed Protestant Christianity.[18]

II. The Decision of the District Court

The Jagers brought this lawsuit on September 19, 1986 seeking declaratory and injunctive relief to stop the Douglas County School System from "permitting, authorizing and condoning religious ceremonies at public high school athletic events."[19] A bench trial ensued on November 14 and 15, 1986. At trial, the School System vigorously

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[14] A55, Finding #31.

[15] A55, Finding #33.

[16] A56, Finding #36.

[17] A57, Finding #39.

[18] A57, Finding #40.

[19] Complaint, at 1.

defended its tradition of broadcasting pre-game prayers delivered by Protestant clergymen selected through the Douglas County Ministerial Association.[20]

After hearing evidence and argument from both sides, the trial court concluded that "[t]he central issue in this matter was the constitutionality of the practice of giving pre-game invocations at high school football games in Douglas County, Georgia, and not, as defendants contend, the facial constitutionality of the 'equal access' plan."[21] On February 3, 1987, the trial court decided this central issue in favor of the Jagers by issuing a declaratory judgment, but declining to grant injunctive relief based on the belief "that no additional restraint is necessary to assure the defendants' compliance with the provisions of this Order."[22]

The School System subsequently moved for "clarification" of the effect of the trial court's declaratory judgment on a proposal which surfaced in the trial testimony of School Superintendent Shehane labelled the "equal

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[20] The School System's trial brief, served November 13, 1986, makes no mention of any "equal access" plan.

[21] The trial court articulated this conclusion in its Order of June 2, 1987 in response to the eleventh-hour mootness argument raised by the School System. *See* Appendix IV to the petition for certiorari, at A63.

[22] Order of February 3, 1987 (Appendix II to the petition for certiorari, at A59).

access" plan.[23] In response to this motion, the trial court entered a further order on February 27, 1987 concluding that this "equal access" plan was constitutional on its face, but declining "to express any opinion as to the

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[23] A colloquy between the trial judge and lead counsel for the School System at a March 27, 1987 hearing offers some insight into the trial court's confusion and the School System's "heads-I-win; tails-you-lose" strategy with respect to the "equal access" plan:

> *Judge Tidwell:* [T]here were some changes between the equal access plan that was attached to his complaint [i.e., the Jenkins Mountain proposal] and the equal access plan as it is now [*i.e.*, the proposal described by Superintendent Shehane at trial]. Isn't it?
>
> *Mr. Jones:* I don't think so, your Honor, because the court ---
>
> *Judge Tidwell*: Wasn't the Ministerial Association, weren't they involved in the first and not in the second?
>
> *Mr. Jones:* Your Honor, I think the one thing you may be thinking about is what was called Exhibit B. It had a top part and a bottom part, and the top part referred to certain purposes, and so forth.
>
> But the plan itself, which appeared on the bottom, the Court found to be coextensive with what had been discussed earlier in the meetings between the ministers and counsel for the plaintiffs and the two Mr. Jagers.
>
> And the findings of fact of the Court are that the equal access plan, as described in the Court's judgment and as testified to by Ms. Shahan [sic: Shehane], were identical, if you will, to that earlier equal access plan. *So there's never been but one plan before the Court during the litigation. That was the plan that was formulated before this lawsuit was ever filed.* (Transcript of March 27, 1987, at 13-14 (emphasis supplied)).

application of the "equal access" plan."[24] Following the disposition of motions over the taxation of costs and attorneys' fees,[25] cross appeals from the trial court's rulings were taken to the Court of Appeals for the Eleventh Circuit.

III. The Decision of the Court of Appeals

The Court of Appeals' decision is accurately reprinted in Appendix I to the petition for certiorari. Supported by a concurrence "in the result reached by the majority and with the choice of legal authority to support its position",[26] the panel majority: (1) affirmed the trial court's order declaring the School System's pregame invocations unconstitutional; (2) reversed the trial court's order declaring the "equal access" plan constitutional on its face; and (3) remanded to the trial court for reconsideration of its award of attorneys' fees.[27]

On January 23, 1989, the School System sought rehearing *in banc*. By a majority vote of the Eleventh Circuit Judges in active service, this request was denied through an order issued on March 3, 1989.[28] On April 21, 1989, the Court of Appeals issued its mandate and judgment remanding the case to the trial court for disposition of the pending attorneys' fees issues.

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[24] Order of February 27, 1987, reprinted at Appendix III to the petition for certiorari, at A60.

[25] *See* Appendices IV & V to the petition for certiorari.

[26] Concurring opinion of Senior Circuit Judge John W. Peck, reprinted in Appendix I to the petition for certiorari, at A25 - A26.

[27] Appendix I to the petition for certiorari, at A25.

[28] Appendix VI to the petition for certiorari, at A75 - A76.

REASONS FOR DENYING THE WRIT

I. The Fact-Specific Basis Of The Decision Below Does Not Present A Certworthy Question Under Rule 17.1(c).

Contrary to the School System's contentions, this case does *not* involve presidential inaugurations, sessions of the United States Congress, or sessions of the United States Supreme Court. As the Court of Appeals' opinion makes readily apparent, this case involves the actions and the motives of one county public school system in the State of Georgia with a troubled history of noncompliance in matters governed by the Establishment Clause.[29] The trial court heard testimony from the elected officials who govern Douglas County's public schools and became convinced that their actions in having and supporting pregame invocations: (1) were "motivated by a desire to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity";[30] and (2) "create the appearance or impression that the school system endorsed Protestant Christianity."[31]

---

[29] Beyond the facts found by the trial court with regard to Protestant Christian clergy involvement in the traditional recruitment of invocation speakers and in the School System's formulation of a response to this dispute over its traditional delivery of clergy-led pregame prayers, evidence at trial showed that, in Douglas County public schools, the practices of Gideon New Testament Bible distribution and teacher-led Protestant prayers persisted until 1986. Trial transcript at 40-42, 80-81, 202-203.

[30] Order of February 3, 1987 (Appendix II to Petition for certiorari, at A57, Finding #39).

[31] *Id.*, Finding #40.

This case turns on egregious evidence of religious favoritism in a public school setting. It offers no useful vehicle through which this Court can offer guidance to other federal courts confronted with Establishment Clause disputes over the question of more general application: constitutional limits on the accommodation of ceremonial invocations at public events. Under the circumstances, review of a case in which the trial court correctly found the facts and the Court of Appeals correctly applied the law would be a waste of this Court's resources.

II. The Court Of Appeals' Decision Does Not Present A Conflict Requiring Review Under Rule 17.1(a).

A. The Eleventh Circuit's Application of the Lemon Test to Prayer Broadcasts in a Public School Setting Does Not Conflict with Marsh or its Progeny.

This Court has issued numerous Establishment Clause decisions since *Lemon v. Kurtzman*, 403 U.S. 602 (1971). With one notable exception, the Court has employed the principles articulated in *Lemon* as the rationale for decision.[32] The lone exception, *Marsh v. Chambers*,

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[32] *Bowen v. Kendrick*, ___ U.S. ___, 108 S.Ct. 2562 (1988); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327; *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Mueller v. Allen*, 463 U.S. 388 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Stone v. Graham*,

(Continued on following page)

463 U.S. 783 (1983), rests on an historical analysis of the Framers' acceptance of "nonsectarian"[33] legislative prayer under circumstances which do not "symbolically place the government's official seal of approval on one religious view."[34]

This Court has never extended the unique analysis of *Marsh* to public school settings.[35] Indeed, the decisions of this Court indicate that *Marsh's* "historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Edwards v. Aguillard*, 482 U.S. at 583, n.4. *See also Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

(Continued from previous page)

449 U.S. 39 (1980); *Wolman v. Walters*, 433 U.S. 229 (1977); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

[33] 463 U.S. at 793, n.14.

[34] 463 U.S. at 792.

[35] The Court has been consistently vigilant to protect religious minorities in the public schools from expression of governmental favoritism toward the majority's religious preference that "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are the insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring). This vigilance reflects Justice Frankfurter's cogent observation: "In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (concurring opinion).

The Eleventh Circuit's majority opinion squarely addresses both *Marsh* and its progeny from the Sixth[36] and Seventh Circuits.[37] For the reasons articulated in this Court's opinion in *Edwards*, the Eleventh Circuit properly concluded that *Marsh's* unique historical analysis of the subject of legislative prayer has no application to the public school setting. 862 F.2d at 828-829 (Appendix I to petition for certiorari, at A10 - A12). On this basis, the Eleventh Circuit found *Van Zandt's* extension of the *Marsh* analysis to a legislative prayer issue arising over the existence of a prayer room in the Illinois state capitol building "inapposite here." 862 F.2d at 829 n.9 (Appendix I to petition for certiorari, at A12, n.9). Thus, *Marsh* and *Van Zandt* are readily distinguishable and not in conflict with the ruling here.

There is also no conflict with *Stein*. Contrary to the School System's characterization of this decision by a fragmented panel of the Sixth Circuit, *Stein holds* that the graduation ceremony prayers challenged in that case violated the Establishment Clause because they contained "language that is unacceptable under *Marsh*, language which says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours." 822 F.2d at 1410. The writing judge reached this conclusion under the rationale of *Marsh*. A second Sixth Circuit judge concurred in the result, but applied *Lemon* principles.

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[36] *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

[37] *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

The *result* in *Stein* does not conflict with the decision here; indeed, these cases are perfectly consistent in striking down sectarian prayers at public school functions. The reasoning underlying these uniform results is admittedly different. However, differences in the rationale employed by the Circuits for reaching uniform decisions do not, by themselves, warrant the exercise of this Court's power of certiorari.

B. The Eleventh Circuit Correctly Applied the *Lemon* Test.

The trial court found that pregame prayers as they were delivered in the Douglas County School System violated both the purpose and effect prongs of the *Lemon* test.[38] The trial court further found that the "equal access" plan at issue in this case was proposed by Douglas County Ministerial Association members for the express purpose of "perpetuat[ing] and regulat[ing] the traditional invocation as part of the opening ceremonies of school athletic events."[39] The record establishes that the School Superintendent and high school principals met and resolved to proceed in accordance with the Jenkins/Mountain "equal access" plan.[40] The School System's counsel told the trial court "there's never been but one ['equal access'] plan before the Court."[41]

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[38] Order of February 3, 1987 (Appendix II to petition for certiorari, at A57, Findings #39 & #40).

[39] *Id.*, at A55, Finding #29.

[40] *Id.*, Finding #31.

[41] See colloquy of March 27, 1987 reprinted at n.23, supra.

On this factual record, the Court of Appeals properly applied the *Lemon* test. In light of the trial court's finding that the School System had "never identified any secular purpose for the invocation until this lawsuit arose,"[42] the Court of Appeals correctly scrutinized the record for the actual motives (as distinguished from after-the-fact rationalizations) that animated the School System to embrace the "equal access" plan. This process of scrutiny understandably left concurring Judge Peck with "the haunting thought that the equal access plan comes across . . . as a thinly veiled attempt to continue the forty year old traditional pre-game prayer format found unconstitutional by the district court." 862 F.2d at 835 (Appendix I to petition for certiorari, at A25).

The Court of Appeals opinion does note that the School System rejected nonsectarian means for accomplishing the purported goals of the "equal access" plan: to inject dignity and solemnity into high school football games. However, the conclusion that pregame prayers in the Douglas County schools continue to violate both the purpose and effect prongs of the *Lemon* test hardly rests on that fact alone. There is overwhelming support for the determination that the School System acted with tainted motive, ranging from the trial court's explicit findings of fact based upon its first-hand review of the evidence to the evidence summarized in footnote 11 of the Court of Appeals' opinion. Moreover, nothing in the School System's "equal access" plan redresses the impression forged on forty years of constitutional violations that the Douglas County School System favors Protestant Christianity.

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[42] *Id.*, Finding #36.

As the panel majority's opinion observes: "[t]his message becomes even clearer when the context of these pregame prayers is understood." 862 F.2d at 831 (Appendix I to petition for certiorari, at A16).

III. There Is No Reason To Delay Resolution Of This Case Pending A Decision In *County of Allegheny v. ACLU*.

The School System has urged the Court to delay its decision on this petition pending the issuance of a decision in *County of Allegheny v. ACLU*, Case Nos. 87-2050, 88-90, & 88-96. These cases deal with the display of religious symbols on public property.

The School System argues that a decision upholding the displays at issue in those cases "would be further support for" its position. It does not specify how or why.

On the other hand, the School System contends that a decision finding these displays unconstitutional would have no controlling effect on this case.

The Jagers believe that any decision in the *County of Allegheny* cases would have, at most, marginal impact on this case. The factual bases for distinguishing this challenge to prayers in a public school setting from disputes over the display of religious symbols on public property are readily apparent. Given the Court's traditional fact-specific approach to Establishment Clause questions and its "unwillingness to be confined to any single test or criterion in this sensitive area,"[43] the prospect that this

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[43] *Lynch v. Donnelly*, 465 U.S. at 679.

case can or should hinge on the result in *County of Allegheny* seems most remote. In these circumstances, the remand of this case to the trial court for final disposition should not be further delayed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied without delay.

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May 1, 1989

Supreme Court, U.S.
FILED
MAY 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1610

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION,
Petitioners,

vs.

DOUG JAGER and WILLIAM JAGER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITIONERS' REPLY MEMORANDUM

Petitioners Douglas County School District and Douglas County Board of Education ("the School District") respectfully submit this Reply Memorandum.

The Jagers' opposing brief misstates the question presented by the petition, and raises arguments in opposition to the petition that are incorrect and misleading.

I. The Decision of the Eleventh Circuit in This Case Is in Direct Conflict With the Decision of the Sixth Circuit in Stein v. Plainwell Community Schools.

The Jagers' statement that "[t]here is . . . no conflict with *Stein*"[1] is simply wrong. There is a direct conflict in both the reasoning and the result.

The Sixth Circuit held in *Stein* that the practice of having ceremonial invocations at high school graduation ceremonies does not violate the Establishment Clause.[2] Invocations in that Circuit are permitted if they are "nonsectarian" and "nonproselytizing."[3]

The Eleventh Circuit held in this case that a plan permitting ceremonial invocations at high school football games does violate the Establishment Clause. Invocations in this Circuit are prohibited even if they are nonsectarian and nonproselytizing.

The two Circuits have thus interpreted and applied the Establishment Clause in diametrically opposite ways.[4]

The conflict in result in inescapable and complete: school districts in the four states of the Sixth Circuit can continue to have ceremonial invocations at extra-

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1. Brief of Respondents at 12.

2. *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

3. *Id.* at 1409-1410.

4. The Jagers do not contend that the constitutional analysis is any different for invocations at graduation ceremonies and athletic events, and the Eleventh Circuit made no such distinction. The Eleventh Circuit thought *Stein* was wrongly decided and disagreed with the Sixth Circuit's reasoning. App. A12.

curricular events while school districts in the three states of the Eleventh Circuit cannot.[5]

There can hardly be a more direct conflict. The School District respectfully requests the Court to grant certiorari to resolve this conflict.

II. The Decision Is Not "Fact-Specific" and Instead Has Broad Application to Ceremonial Invocations Given at All Public Community Events in the Eleventh Circuit.

The Jagers implicitly recognize that the question of the "constitutional limits on the accommodation of ceremonial invocations at public events" is worthy of resolution by this Court.[6] Their attempt to minimize the cert-worthiness of this case by arguing that the Eleventh Circuit's decision affects only *this* School District is quite misleading and is belied by the court's opinion.[7]

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5. District and state courts have differed on this subject as well. *Compare Graham v. Central Community School District of Decatur County*, 608 F. Supp. 531 (S.D. Iowa 1985), and *Kay v. David Douglas School District No. 40*, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd as moot*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 108 S. Ct. 740 (1988) (holding that invocations are unconstitutional) *with Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974); *Goodwin v. Cross County School District No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973); *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293 (W.D. Pa. 1972); and *Wiest v. Mt. Lebanon School District*, 320 A.2d 362 (Pa. 1974) (holding that invocations are constitutional).

6. Brief of Respondents at 10.

7. The "facts" relied on by the Jagers in their brief relate only to the prior practice of having ministers as invocation speakers. This practice was abandoned before the lawsuit was filed and was replaced by the equal access plan.

For example, the Jagers fail to point out that the district court's findings of an impermissible purpose and effect refer only to the *prior practice* and not the equal access plan. *See* App. A57 ("One of the defendants' purposes . . . *was* motivated

(Continued on following page)

The Eleventh Circuit's holding has broad application. It would apparently prohibit invocations at all extracurricular school events in the Eleventh Circuit, including not only athletic events but also graduation ceremonies and similar events even though attendance at these extracurricular events is completely voluntary and the student-teacher relationship is not implicated. Ceremonial invocations would be prohibited in the Eleventh Circuit:

— regardless of the neutral and unobjectionable content of the invocations;

— regardless of the existence of legitimate secular purposes; and

— regardless of the fact that there is no proselytizing and no attempt to convert the audience.

The decision thus significantly affects every school district in the Eleventh Circuit.

Indeed, under the Eleventh Circuit's reasoning, ceremonial invocations at public community events completely outside the school setting would similarly be prohibited. Holding that "the state cannot employ a religious means

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Footnote continued—

. . ." and "One of the effects of the *prior practices* in regard to invocations *was* . . .") (emphasis added). The district court expressly held that the equal access plan *is* constitutional on its face. App. A60.

Furthermore, these "facts" regarding the prior practice are irrelevant to the *facial constitutionality* of the equal access plan, which was the only issue before the court. In *Bowen v. Kendrick*, ... U.S. ....., 108 S. Ct. 2562, 2569-2570 (1988), this Court emphasized that in reviewing the *facial constitutionality* of a statute, a court should not look beyond the face of the statute.

The Jagers do not (and indeed cannot) contest the facial neutrality of the equal access plan.

to serve otherwise legitimate secular interests,"[8] App. A14, the Eleventh Circuit concluded that the School District violated the Establishment Clause because it could have preceded its football games with "a secular inspirational speech" instead of an invocation. App. A13. At *any community event*—school-related or not—a ceremonial invocation could arguably be replaced by a secular inspirational speech. Under this rationale, any ceremonial invocation would violate the Establishment Clause.

In focusing solely on the religious aspect of invocations,[9] the Eleventh Circuit further demonstrates that its decision applies to ceremonial invocations at all public events. An invocation invariably has a religious component as well as a secular component. No invocation—whether or not given in a school setting—can withstand this scrutiny.

In summary, the Jagers' attempt to trivialize the importance of this case must be rejected.

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8. As explained on pages 11-13 of the School District's petition, this Court has expressly rejected the Eleventh Circuit's reasoning. *See Lynch v. Donnelly*, 465 U.S. 668, 681 n.7 (1984).

The Jagers apparently recognize the incorrectness of the Eleventh Circuit's reasoning on this point. *See* Brief of Respondents at 14.

9. As pointed out on pages 10-11 and 14-16 of the petition, this is also contrary to the teaching of *Lynch*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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